

*Paul C. Wagner* *468*  
36  
**TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1924**

**No. 233**

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**READING STEEL CASTING COMPANY, PLAINTIFF IN  
ERROR,**

**vs.**

**THE UNITED STATES OF AMERICA**

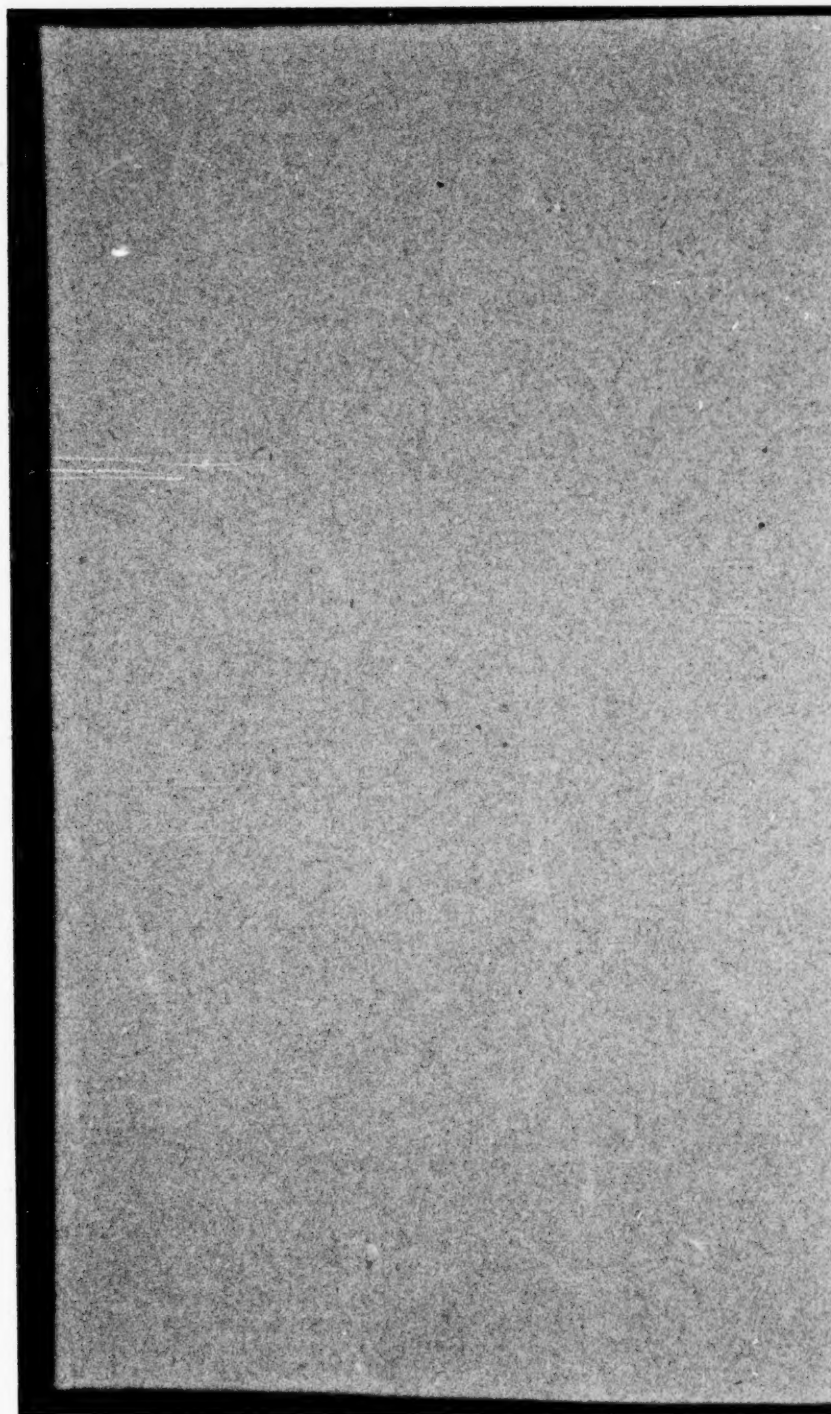
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**IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF PENNSYLVANIA, TRANSFERRED  
FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR  
THE THIRD CIRCUIT, PURSUANT TO ACT OF CONGRESS OF  
SEPTEMBER 14, 1922**

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**FILED DECEMBER 4, 1924**

*Wagner (20,000) additional  
findings of fact*



(29,990)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 680

READING STEEL CASTING COMPANY, PLAINTIFF IN  
ERROR,

vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE EASTERN DISTRICT OF PENNSYLVANIA, TRANSFERRED  
FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR  
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SEPTEMBER 14, 1922

INDEX

	Page.
Record from U. S. district court, eastern district of Pennsylvania.....	1
Docket entries.....	1
Writ of error.....	2
Petition .....	4
Exhibit A—Contract, N. M. C. 507 Q. M., between Reading Steel Casting Co. and post quartermaster, U. S. M. C., September 4, 1918.....	7
Answer .....	15
Bill of exceptions.....	18
Testimony of F. H. Decha .....	19
Exhibit A—Contract between Reading Steel Casting Co. and United States, September 4, 1918.....	27
B—Letter, J. Turner Moore to public works officer, August 3, 1918.....	40
E—Letter from post quartermaster, Marine Bar- racks, Quantico, Virginia, to Reading Steel Casting Company, dated August 27, 1918....	44

	Page
Exhibit F—Letter from Reading Steel Casting Company to post quartermaster, Marine Barracks, Quantico, Virginia, dated August 24, 1918.....	48
G—Orders from chief of Bureau of Navigation to Ensign Frederick H. Dechant, dated September 9, 1918, with four endorsements.....	50
H—Orders from chief of Bureau of Navigation to Lieut. F. H. Dechant, dated February 7, 1919, with four endorsements.....	54
I—Letter from Lieutenant Dechant to the Reading Steel Casting Company, dated February 10, 1919 .....	57
J—Letter, dated February 17, 1919, from F. H. Dechant to public works officer, Quantico, Virginia .....	59
K—Letter, dated February 15, 1919, from Reading Steel Casting Company, J. Turner Moore, president, to Lieut. F. H. Dechant.....	60
L—Orders from chief of Bureau of Navigation to Lieutenant Dechant, dated April 22, 1919, with three endorsements.....	62
Testimony of J. Turner Moore.....	83
Exhibit L-1—Letter from Reading Steel Casting Company to United States Marine Corps, Quantico, Virginia, dated January 6, 1919.....	85
M—Letter from Reading Steel Casting Company to United States Marine Corps, dated January 29, 1919, with three endorsements.....	86
N—Letter from Reading Steel Casting Company to United States Marine Corps, Quantico, Virginia, dated February 4, 1919, with first endorsement .....	88
O—Letter from Reading Steel Casting Company to United States Marine Corps, Quantico, Virginia, dated February 10, 1919.....	88
P—Letter from Reading Steel Casting Company to United States Marine Corps, Quantico, Virginia, dated February 24, 1919.....	89
Q—Letter from Reading Steel Casting Company to United States Marine Corps, Quantico, Virginia, dated April 24, 1919.....	90
R—Letter from Reading Steel Casting Company to United States Marine Corps, Quantico, Virginia, dated May 5, 1919, with two endorsements .....	90
S—Letter from Capt. C. D. Sniffin, assistant post quartermaster, Quantico, Virginia, to Reading Steel Casting Company, dated May 5, 1919 .....	92
T—Letter from Reading Steel Casting Company to United States Marine Corps, Quantico, Virginia, dated May 14, 1919.....	93



# INDEX

iii

Page

<b>Exhibit U</b> —Letter from Capt. C. D. Sniffin, assistant post quartermaster, Quantico, Virginia, to Reading Steel Casting Company, dated May 21, 1919 .....	95
<b>V</b> —Letter from Reading Steel Casting Company to United States Marine Corps, Quantico, Virginia, dated May 22, 1919.....	96
<b>W</b> —Purchase order and voucher.....	97
<b>X</b> —Letter from Reading Steel Casting Company to United States Marine Corps, Quantico, Virginia, dated June 9, 1919.....	99
Testimony of Edgar J. Kates.....	118
Testimony of J. M. Smeallie.....	139
<b>Exhibit Y</b> —Smeallie's report to quartermaster, October 22, 1919 .....	144
Testimony of Charles D. Sniffin.....	149
<b>Exhibit Z</b> —Letter, J. Turner Moore to C. D. Sniffin, September 26, 1919.....	154
Defendant's Exhibit—Correspondence.....	156
Testimony of F. H. Dechant (recalled).....	159
Testimony of J. Turner Moore (recalled).....	162
<b>Exhibit A-1</b> —Letter, post quartermaster to Quartermaster General, October 11, 1919, and eight endorsements thereto .....	165
Letter, H. C. Roosevelt to Reading Steel Casting Co., December 6, 1919.....	182
Opinion, Dickinson, J., sur trial by the court sitting without a jury.	184
Plaintiff's exceptions to findings of fact and conclusions of law....	194
Order sealing bill of exceptions.....	197
Præcipe to enter judgment.....	198
Judgment .....	198
Petition for writ of error.....	199
Order allowing writ of error.....	200
Assignments of error.....	201
Præcipe for transcript of record.....	206
Clerk's certificate.....	207
Proceedings in C. C. A.....	208
Per curiam opinion.....	208
Order transferring cause.....	209
Clerk's certificate.....	210



IN THE  
District Court of the United States,  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

---

March Term, 1920. No. 6834.

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READING STEEL CASTING COMPANY

v.

UNITED STATES OF AMERICA.

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DOCKET ENTRIES.

Apr.	9,	1920.	Petition for payment of claim, filed.
"	9,	"	Exhibit "A" filed.
Sept.	29,	1920.	Appearance of Charles D. McAvoy, Esq., for defendant, filed.
Nov.	16,	1920.	Præcipe to place case on Argument List, filed.
Sept.	29,	1921.	Answer to Petition, filed.
Nov.	7,	1921.	Hearing—Witnesses sworn.
"	10,	"	Hearing resumed—Witnesses sworn.
June	1,	1922.	Opinion, Dickinson, J., entering judg- ment in favor of defendant, filed.
"	6,	"	Plaintiff's exceptions to findings of fact and conclusions of law, filed.
"	23,	"	Bill of Exceptions, filed.
"	23,	"	Order of Court sealing Bill of Excep- tions, filed.
Nov.	4,	1922.	Præcipe to enter judgment in favor of defendant, filed.
"	4,	"	Judgment in favor of defendant, filed.
"	21,	"	Assignments of Error filed.

Robert  
Mays.  
J. C.  
Wagner.

W.  
Coles.

- Nov. 21, 1922. Petition for Writ of Error filed.  
 “ 21, “ Order of Court granting prayer of  
 petition, filed.  
 “ 21, “ Bond for Costs sur Writ of Error,  
 filed.  
 “ 21, “ Order of Court approving Bond for  
 Costs sur Writ of Error, filed.  
 “ 21, “ Writ of Error allowed and copy  
 thereof lodged in Clerk's office for  
 adverse party.  
 “ 21, “ Citation allowed and issued.  
 “ 21, “ Copy of Notice of Appeal filed.  
 “ 21, “ Praeipe for transcript of record sur  
 Writ of Error, filed.  
 “ 24, “ Citation returned “service accepted”  
 and filed.

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### WRIT OF ERROR.

---

UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES,

*To the Honorable the Judges of the District Court of  
 the United States for the Eastern District of Penn-  
 sylvania,*

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Reading Steel Castings Company and United States of America a manifest error hath happened, to the great damage of the said Reading Steel Castings Company as by its complaint appears. We being willing that error, if any hath been, should be duly cor-

rected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the city of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the HONORABLE WILLIAM HOWARD  
TAFT, Chief Justice of the Supreme Court  
of the United States, at Philadelphia, the  
(Seal) twenty-first day of November in the year  
of our Lord one thousand nine hundred  
and twenty-two.

GEORGE BRODBECK,  
*Clerk of the District Court of  
the United States.*

Allowed by  
O. B. DICKINSON,  
J.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA.

---

March Sessions, 1920. No. 6834.

---

*Reading Steel Casting Company, a Corporation of the  
State of Pennsylvania,*

v.

*The United States of America.*

---

PETITION.  
(Filed April 9, 1920.)

---

*To the Honorable the Judges of the District Court of  
the United States for the Eastern District of Penn-  
sylvania:*

Reading Steel Casting Company respectfully rep-  
resents:

✓  
1. Your petitioner, Reading Steel Casting Com-  
pany, is a corporation organized and existing under the  
laws of the State of Pennsylvania, with its principal  
office in the City of Reading, State of Pennsylvania,  
and in the Eastern District of Pennsylvania.

✓  
2. This is an action against the United States of  
America, civil in nature, the amount in controversy be-  
ing less then ten thousand dollars (\$10,000).

3. On or about September 4, 1918, your petitioner,  
Reading Steel Casting Company, and the United States  
of America, by its duly authorized agent, H. L. Roose-  
velt, Lieutenant-Colonel, A. Q. M., U. S. M. C. Post  
Quartermaster, Marine Barracks, Quantico, Virginia,  
acting under the direction of the Secretary of the

hand  
over  
2-2-20

Navy, entered into a contract whereby your petitioner agreed to make two flywheels and deliver same to De La Vergne Machine Company in the city of New York, for the price and upon the terms set forth in said contract, a copy of which is hereto annexed and marked "Exhibit A," and the United States of America agreed to accept and pay for the same.

4. Said written contract was entered into and executed by your petitioner on the faith of and relying upon an oral contemporaneous agreement between your petitioner, Reading Steel Casting Company, and the United States of America, by its duly authorized agent, Frederick H. Dechant, Lieutenant (j. g.) U. S. N. R., Public Works Officer, Marine Barracks, Quantico, Virginia, which provided that said flywheels were to be inspected by the said Lieutenant Frederick H. Dechant whose acceptance or rejection of the same would be final and binding upon all parties to the written contract.

5. Your petitioner has faithfully performed all the conditions and stipulations of the said contracts on its part to be performed and has manufactured and delivered the said flywheels to De La Vergne Machine Company as the representative of the United States of America, in accordance with the terms of the said written contract, and the same were duly accepted by the United States of America.

6. By reason of such manufacture and delivery of said flywheels and pursuant to said contract, there is due and owing to your petitioner from the United States of America the sum of seventy-five hundred and eighty-one dollars and ninety-five cents (\$7581.95), which amount still remains unpaid, although repeated demands have been made therefor. Bills for said fly-



wheels, so manufactured and delivered, were duly sent to the proper officers of the United States of America at the time provided by, and in accordance with the terms of said contract, but the same have never been paid, nor has any part thereof been paid; and your petitioner therefore claims that there is now due and owing to it from the United States of America the sum of seventy-five hundred and eighty-one dollars and ninety-five cents (\$7581.95), as aforesaid.

Wherefore your petitioner prays for a judgment or decree against the United States of America upon the facts and law for the sum of seventy-five hundred and eighty-one dollars and ninety-five cents (\$7581.95), together with its reasonable costs and disbursements, and for such other and further relief in the premises as may be just.

And your petitioner will ever pray.

I        ING STEEL CASTING  
          NY,

By D. R. BOMBERGER,

(Seal)

*Treasurer.*

COUNTY OF BERKS,                    }  
STATE OF PENNSYLVANIA, } ss.:

D. R. Bomberger, being duly sworn according to law says that he is the treasurer of the corporation, petitioner in the above entitled cause; that he is duly authorized by said corporation to make this affidavit; that he is acquainted with the facts set forth in the foregoing petition, and that the said facts are true to the best of his knowledge, information and belief.

Sworn to and subscribed )  
before me this twenty- )  
fourth day of March, A. ) D. R. BOMBERGER.  
D. 1920.                    )

EDNA M. ROSS,  
(Seal)           *Notary Public.*

My commission expires at end of next session  
of Senate.

---

"EXHIBIT A."

Awarded   August 27, 1918.  
Bond       Corporate

Prepared	LHL
Verified	S
Copies	JFB
Compared	DDW & JWS

N.M.C. 507-QM.  
(Actual damages.)

CONTRACT FOR SUPPLIES OR SERVICES  
QUARTERMASTER'S DEPARTMENT  
U. S. Marine Corps.

THIS CONTRACT, of two parts, made and entered this 4th day of September, A. D. 1918, by and between READING STEEL CASTING COMPANY Reading, Pa., and the Post Quartermaster, United States Marine Corps, Marine Barracks, Quantico, Va., acting under the di-

rection of the Secretary of the Navy, for and in behalf of the United States of America, of the second part;

WITNESSETH: That for and in consideration of the payments hereinafter specified the party of the first part, for itself and its personal and legal representatives, successors and assigns does hereby covenant and agree by and with the party of the second part, as follows, *viz.*: (See note).

1. That the said party of the first part shall furnish and deliver, at its own risk and expense, at the place and within the time hereinafter specified, the following, *viz.*: (See note.)

(Schedule No. Q-178.)

Item No.

1. One (1) Fly Wheel, cast in halves, as per blue print FHB-322, to be cast in the rough at 11½¢ per lb.....

One (1) Fly Wheel, cast in halves, as per blue print FH-549, to be cast in the rough, at 11½¢ per lb.....

To include pattern equipment of the above Fly Wheels.

#### DELIVERY.

Delivery of the fly wheels is to be made f. o. b. Reading, Pa., shipment to be made within eight (8) weeks from date of August 3, 1918, on Government bill of lading No. M-23602-19 addressed to the De La Vergne Machine Co., of New York City; shipment of the pattern equipment to be made f. o. b. Reading, Pa., on enclosed Government bill of lading No. M-23603-19 at the earliest practicable date, addressed to the Post Quartermaster, Marine Barracks, Quantico, Va.

Priority certificate and number for the manufacture of the above-mentioned material, will be obtained and forwarded at the earliest possible date.

The contractor expressly warrants that he has employed no third person to solicit or obtain this contract in his behalf, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that he has not paid, or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commission, or percentage upon the amount receivable by him hereunder; and that he has not, in estimating the contract price demanded by him, included any sum by reason of any such brokerage, commission, or percentage; and that all monies payable to him hereunder are free from obligation to any other person for services rendered, or supposed to have been rendered, in the procurement of this contract. He further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the United States, and that the United States may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission or percentage so paid, or agreed to be paid.

IT IS UNDERSTOOD AND AGREED that all work required in carrying out this contract shall be performed in full compliance with the laws of the State, Territory or District of Columbia, where such labor is performed; provided, that the contractor shall not employ in the performance of this contract any minor under the age of fourteen years or permit any minor between the age of 14 and 16 years to work more than 8 hours in any one day, more than six days in any one week, or before 6 A. M. or after 7 P. M. Nor shall the

contractor directly or indirectly employ any person undergoing sentence of imprisonment at hard labor which may have been imposed by a court of any State, Territory, or municipality, having criminal jurisdiction. Provided, however, that the President of the United States may by executive order, modify this provision with respect to the employment of convict labor and provide the terms and conditions upon which such labor may be employed. This provision shall be of the essence of the contract.

In addition to the ordinary precautions heretofore adopted by the contractor for the guarding and protection of its plant and work, the contractor shall provide such additional watchmen and devices for protection of its plant and property and the work in process for the Navy Department against espionage, acts of war, and of enemy aliens as may be required by the Secretary of the Navy. The contractor shall, when required, report to the Secretary of the Navy the citizenship, country of birth or alien status of any and all of his employees. When required by the Secretary of the Navy, he shall refuse to employ or if already employed forthwith discharge from employment and exclude from his works any person or persons designated by the Secretary of the Navy for cause as undesirable for employment on work for the Navy Department.

2. That the said party of the first part shall furnish the foregoing-mentioned article, articles, or services in strict and full accordance with the requirements of the specifications therefor, a true and correct copy of which specifications is attached hereto and forms part of this contract, and the proposal of the party of the first part, which proposal shall be deemed and taken as forming part of this contract with like operation and effect as if the same were incorporated herein; it being understood and agreed by the party

of the first part that the article, articles, or services furnished hereunder shall, upon delivery or completion, and as a condition precedent to the acceptance thereof, be inspected, examined, and approved by the officer or officers authorized by the party of the second part to inspect and examine the same; any article, articles, or services not so approved will be rejected and shall be removed by the party of the first part at its own expense immediately after the receipt of written notification of such rejection.

3. That the party of the first part further covenants and agrees to hold and save the United States, its officers, agents, servants, and employees, harmless from and against all and every demand, or demands, of any nature or kind, for or on account of the use of any patented invention, article, or appliance included in the article, articles, or services hereby agreed to be furnished under this contract.

4. It is an express condition of this contract that no Member of or Delegate to Congress, nor any person belonging to or employed in the naval establishment, shall be admitted to any share or part of this contract or to any benefit to arise herefrom, except as a member of a corporation; that this contract shall not, nor shall any interest herein, be transferred by the party of the first part to any other person or persons; and that, in the performance of this contract, no persons shall be employed who are undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having a criminal jurisdiction.

5. If the party of the first part shall fail to deliver the article or articles or perform the services contracted for hereunder, by and at the time and place specified herein, the Quartermaster may waive the time limit and permit the party of the first part to finish the contract within a reasonable period, to be deter-

mined by the Quartermaster. Should the original time limit be thus waived, all expenses for inspection and superintendence, including all necessary traveling expenses in connection therewith, and all other actual expenses and damages to the United States due to delay beyond the time prescribed for completion, shall be deducted from any payments due or to become due the party of the first part: PROVIDED, That such delay shall not have been caused by the act of the party of the second part, by strikes, fire, riots, or other disaster, delays in transit or in delivery on the part of transportation companies, or by other circumstances beyond the control of the party of the first part, but such circumstances shall not be deemed to include delays on the part of subcontractors in furnishing materials when such delays arise from causes other than those herein specified: AND PROVIDED FURTHER, That the amount of such actual expenses and damages, and the question whether delays are due to the causes herein specified, shall be determined by the Quartermaster, and shall be accepted by the parties hereto as final. But such waiver of the time limit and remission of charges shall in no manner affect the rights and obligations of the parties under this contract.

6. It is further covenanted and agreed that if the said party of the first part shall fail in any respect to perform the contract the same may, at the option of the United States, be declared null and void, without prejudice to the right of the United States to recover for defaults therein or violations thereof; or the said party of the second part may purchase or procure in such manner and from such person or persons as he deems proper, paying such price therefor as may be necessary in order to procure the same, such of said articles or materials of the kind specified as near as practicable, or procure the performance of such



services, as the said party of the first part shall fail to deliver or perform as required, and may demand and recover from the said party of the first part the difference between the price so paid therefor and the price stipulated in this contract; and the party of the first part hereby binds itself and its representatives aforesaid to pay the amount of such difference to the party of the second part on demand, it being understood that no deductions for delays shall be made in accordance with the preceding clause hereof from the price of any article or value of any services after the same shall have been otherwise delivered or procured as provided in this clause.

AND THIS CONTRACT FURTHER WITNESSETH, That the party of the second part, for and in consideration of the foregoing stipulations does hereby covenant and agree to and with the party of the first part as follows, *viz.*:

7. That for the supplies or services furnished, delivered, and accepted under this contract, it will pay, or cause to be paid to the party of the first part the amounts due at the foregoing rates upon presentation of the customary bills and proper evidence of delivery, completion, inspection, and acceptance thereof at the place or places designated.

8. That no payments will be made on any item until all the articles or services embraced in such item shall have been delivered or performed and accepted, except at the option of the said Quartermaster: PROVIDED, That in case of contracts involving materials and labor, ten per centum will be withheld from the amount of each payment as security for the full completion and performance of the covenants and agreements made by the said party of the first part, who shall, when the entire work to be performed under this contract shall have been accepted, be entitled to receive

the aggregate amount of such reservations; but such reservations shall not be withheld from payments on items for materials and labor unless at the option of the said Quartermaster.

9. Subject to the conditions enumerated in section 2 of the eight-hour law of June 19, 1912, no laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work. For each violation of this provision a penalty of five dollars shall be imposed for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work, and the amount of any such penalties shall be withheld for the use and benefit of the United States from any moneys becoming due under this contract, whether the violation of this provision is by the contractor or any subcontractor.

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their names the day and year first above written (See note).

Signed and Sealed in the  
presence of:

READING STEEL CASTING  
PANY,

EDNA M. ROSS as to M. G. MOORE, *Vice-President*  
(SEAL)

EDNA M. ROSS as to J. TURNER MOORE, *President*  
(SEAL)

C. D. SNIFFIN as to H. L. ROOSEVELT  
(SEAL)

*Lieut. Col., A. Q. M., U. S. M. C.,*  
*Post Quartermaster.*

NOTE.—Contracts signed by a firm must be duly signed in the firm name by a member of the firm. Contracts signed by a corporation must be signed in the corporate name by the duly authorized officer of the corporation and sealed with the corporate seal. Evidence of such authority must be appended to the contract. Persons signing contracts as “agent” must also file evidence of authority to do so.

Authority for signature attached to original.

(Blue prints FHB-322 and FH-549 referred to in the above contract are attached to the petition filed in this action.)

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ANSWER TO PETITION.  
(Filed September 29, 1921.)

*To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:*

To the petition filed by the Reading Steel Casting Company, a corporation of the State of Pennsylvania, petitioner, the United States of America, defendant, above named, by George W. Coles, United States Attorney for the Eastern District of Pennsylvania, makes answer as follows:

1. The defendant, the United States of America, admits the averments contained in paragraph 1 of plaintiff's petition.

2. The defendant, the United States of America, admits the averments contained in paragraph 2 of plaintiff's petition.

3. In answer to paragraph 3 of the plaintiff's petition the defendant avers that it was not bound by the written contract entered into with the plaintiff by H. L. Roosevelt, Lieutenant-Colonel, A. Q. M., U. S. M. C.,

Post Quartermaster, Marine Barracks, Quantico, Virginia, because the said H. L. Roosevelt, Lieutenant-Colonel, etc., had no authority to bind the United States of America by the said written contract, and when he did undertake to enter into the contract set out in plaintiff's petition on behalf of the United States of America, defendant, he was acting beyond the scope of his authority.

4. In answer to paragraph 4 of plaintiff's petition the defendant avers that the oral contemporaneous agreement referred to in plaintiff's petition between the petitioner, the Reading Steel Casting Company, and the United States of America, by its duly authorized agent, Fred. H. Dechant, Lieutenant (j. g.) U. S. N. R., Public Works Officer, Marine Barracks, Quantico, Virginia, is void and not binding on the said defendant, and that, therefore, there is no liability thereon; that the said Frederick H. Dechant, etc., was without authority to contract for the United States of America and that any attempt on his part to make a binding contract for and on behalf of the United States of America, defendant, was beyond the scope of his authority.

5. In answer to paragraph 5 of plaintiff's petition the defendant denies the averments contained therein. In further answer thereto the defendant avers that the petitioner failed to faithfully perform all the conditions and stipulations of the contracts, and further avers that the flywheel was rejected as unsuitable for the use for which it was purchased and because it had failed to comply with the specifications of the contract.

6. In answer to paragraph 6 of the plaintiff's petition defendant avers that it is not indebted to the said petitioner in the sum of \$7581.95 or in any amount whatever by reason of the averments contained in the foregoing paragraphs. As to whether or not bills

for the said flywheels were sent to the proper officer of the United States of America, the defendant has no knowledge thereon and if deemed material, demands proof of same on the trial of the cause.

All of which defendant avers to be true and expects to be able to prove at the trial of the cause.

(Sgd.) GEORGE W. COLES,  
*United States Attorney.*

Philadelphia, Pa.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA.

---

March Sessions, 1920. No. 6834.

---

ASSUMPSIT.

---

*Reading Steel Casting Company*

v.

*The United States of America.*

---

BILL OF EXCEPTIONS.

BE IT REMEMBERED that, at a session of the said court, held in the district aforesaid before Honorable O. B. Dickinson, District Judge, on the eighth day of November, 1921, the above-entitled cause came on for trial before said Court, sitting without a jury, Paul C. Wagner, Esquire, appearing as counsel for the plaintiff, and Truman D. Wade, Esquire, appearing as counsel for the defendant; and, upon the trial, counsel for the said plaintiff and counsel for the said defendant offered, respectively, the following testimony, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE  
EASTERN DISTRICT OF PENNSYLVANIA.

---

March Sessions, 1920. No. 6834.

---

*Reading Steel Casting Company, a Corporation of the  
State of Pennsylvania,*

v.

*The United States of America.*

---

Tried before HON. OLIVER B. DICKINSON, JUDGE.

---

Philadelphia, Pa., November 8, 1921.

---

Appearances: PAUL C. WAGNER, Esq., for the plaintiff;  
TRUMAN D. WADE, Esq., for the U. S.  
Government.

---

TRANSCRIPT OF TESTIMONY, RULINGS AND EXCEPTIONS.

---

PLAINTIFF'S EVIDENCE.

---

F. H. DECHANT, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. WAGNER:

Q. Where do you reside?

A. My home is in Reading, Pennsylvania.

Q. What is your business?

A. I am a member of the firm of William H. Dechant & Sons, civil and hydraulic engineers, Reading, Pa.



Q. Where were you during the latter part of 1918?

A. In Quantico, Virginia, as Post Public Works Officer.

Q. At what place in Quantico, Virginia?

A. At the Marine Barracks.

THE COURT: Is that on Quantico Creek?

THE WITNESS: Quantico Creek is slightly north of it.

By MR. WAGNER:

Q. In civil occupation, or with the Army, or what?

A. I was Lieutenant, Junior Grade, Navy, Bureau of Yards and Docks, Civil Engineering Corps.

Q. When did you go in the Navy?

A. May 6th, 1918.

Q. At what grade?

A. Ensign.

Q. To what post were you assigned?

A. Quantico.

Q. In what position?

A. As Assistant Public Works Officer.

Q. When were you made Public Works Officer?

A. In the fall of 1918; November 28th.

THE COURT: As I understand it, he had the rank of Ensign, and was assigned to that duty; is that right?

THE WITNESS: That is right.

By MR. WAGNER:

Q. When did you become Lieutenant, Junior Grade?

A. December 10, 1918.

Q. When did you leave Quantico?

A. In May, of 1919.

Q. You were Public Works Officer until you left Quantico?

A. Until I left Quantico.

Q. What are the duties of Public Works Officer or Assistant Public Works Officer; what were your duties, as such, at Quantico?

A. I was in charge of constructive work on projects outlined by the department.

Q. Are you still in the Naval Reserve, Mr. Dechant?

A. No, I was released because of lack of funds on the part of the country, about two months ago.

MR. WAGNER: I call upon the defendant to produce contract between the Reading Steel Castings Company, and the Post Quartermaster, Marine Barracks, Quantico, Virginia, dated September 4, 1918.

MR. WADE: I want to raise the question at this time, as to the competency of this witness to give testimony in pressing a claim against the Government that arose while he was in the service. I want to object to his testifying relating to this contract, or to any of the dealings between the Government and the Reading Steel Casting Company, because according to the testimony that was already developed he was in the service at the time the contract was placed and was in the service down until as late as at least two months ago; that is a considerable time after the suit was brought. We therefore want to object to his competency as a witness.

THE COURT: I get your point, Mr. Wade, but you will have to enlighten me as to why that renders him incompetent to testify.

MR. WADE: I think that there is a provision which provides that a person in the service shall not assist, as agent or as counsel, and I think it goes to the scope of a witness.

THE COURT: If you will resolve that "think"

into a positive statement, I will consider it. This witness has not shown, as yet, that he is in any way supporting the claim of the plaintiff, in any way whatever. He is simply testifying, under the obligation of his oath, to the facts within his knowledge.

MR. WADE: I appreciate that, your Honor, but I would like to ask the witness a few questions, on this point.

THE COURT: You are raising the question as to his competency; you may cross-examine him at this time, as to that, and develop all the facts.

#### CROSS-EXAMINATION.

By MR. WADE:

Q. Are you a director or officer of the Reading Steel Casting Company?

A. No, sir.

Q. You were employed by the Reading Steel Casting Company—were in their employ before you went into the service of the United States Government?

A. No; the firm of William H. Dechant & Sons was employed by them, among its clientele, so far as its technical engineering work was concerned. As such, I represented them.

Q. Who composed the firm of William H. Dechant & Sons?

A. Father and two sons. I am one of them.

Q. Your father, you and your brother?

A. Yes.

Q. Your father is still living?

A. Oh, yes.

Q. How long have William H. Dechant & Sons been connected with the Reading Steel Casting Company in the capacity you just related?

A. Up to this time.

Q. From what time back?

A. About 1912.

Q. Is your father a stockholder or a director, or in any way connected with the Reading Steel Casting Company?

A. No, sir.

Q. Are you a stockholder?

A. No, sir.

Q. Is the Reading Steel Casting Company a corporation?

A. Yes, sir.

Q. You say you are not a stockholder?

A. No.

Q. Nor a director?

A. No, sir.

Q. And you have no connection whatever, except as an employee of the Reading Steel Casting Company?

A. Yes, sir.

Q. Is that right?

A. That is right.

Q. Is the firm of William H. Dechant & Sons, a corporation?

A. It is just a partnership.

Q. I forget whether you mentioned the date you started in the employ of the Reading Steel Casting Company—

A. In 1912, I think I said.

Q. And you are still connected with the Reading Steel Casting Company?

A. Yes, sir.

Q. Were you connected with the Reading Steel Casting Company while in the service of the United States?

A. Our office was, but I personally had nothing at all to do with it.

Q. You did not sever your connection with the firm of Dechant & Sons?

A. No, sir.

Q. There was no change in the firm name during your absence, in the service?

A. No, sir.

Q. That is right?

A. That is right.

Q. The firm of William H. Dechant & Sons continued in the employ of the Reading Steel Casting Company while you were in the service?

A. Yes, sir.

Q. I suppose you reaped whatever profit was coming to you from the firm of William H. Dechant & Sons during your absence?

A. I did not.

Q. You just allowed your name to be carried along; is that right?

A. That is right.

Q. Has there been an accounting of the profits of the firm while you were away?

A. No. By way of explanation, the firm does not conduct its business in that way.

Q. Will you tell us in what way the firm does conduct its business with respect to the division of profits?

A. Pretty much like all other consulting engineering firms of that like; that is, that the individual who is employed on the work profits by his own effort.

Q. Then, the association is simply one for—is more of an association for advertising purposes—

A. Yes, sir; it is more of an association for the purpose of propaganda, and the bringing together of larger interests rather than for the sharing of profits.

Q. Are you connected by blood or marriage with the directors or president or incorporators of the Reading Steel Casting Company?

A. No, sir.

Q. You have no connection with it whatever?

A. No, sir.

THE COURT: That is, other than as employee?

THE WITNESS: Yes, other than as employee.

I am connected as an employee, yes, but not otherwise.

By MR. WADE:

Q. I understand that your firm was connected with the Reading Steel Casting Company, as employee, during your entire service in the United States Government?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By MR. WAGNER:

Q. You said that you were employed by the Reading Steel Casting Company; did you mean by that you, yourself, were so employed, or the firm of William H. Dechant & Sons?

A. Both.

Q. Did you, yourself, receive any profit whatever out of any transactions between the firm of William H. Dechant & Sons and the Reading Steel Casting Company, either by direct payment to you, or through the firm of Dechant & Sons during the time you were in service?

A. No.

Q. Did the firm of William H. Dechant & Sons, or anyone connected with that firm, if you know, receive any compensation by reason of the manufacture of two flywheels for the United States Marine Corps, by the Reading Steel Casting Company?

A. No. The firm of William H. Dechant & Sons had not anything to do with matters of that kind, for the Reading Steel Casting Company.

THE COURT: As I understand you, your relations with this engineering firm are what we call a plan of compensation, and each member of that firm profits only out of the things which he did, as an engineer?

THE WITNESS: Yes, sir.

THE COURT: There is no common fund, in the ordinary partnership sense?

THE WITNESS: No. By way of explanation further, on that, your Honor, we have other employees, of course, other than ourselves, to whom we pay a salary; but for ourselves, we get compensation just insofar as we function, do work for others.

THE COURT: The testimony of the witness is directed to be taken subject to the objection as stated upon the record, and with leave to counsel for the defendant to move to strike out. The question will be ruled upon, along with the other questions which may arise in the case, and an exception is now allowed to the plaintiff or defendant against whom that ruling finally may be made.

X It is admitted that the paper marked "Plaintiff's Exhibit A" is a certified copy of the contract entered into on the fourth day of September, 1918, by and between the Reading Steel Casting Company, of Reading, Pa., and H. L. Roosevelt, Lieut.-Col., A. Q. M., U. S. M. C. Quartermaster, Quantico, Virginia, stated in the contract to be acting under the direction of the Secretary of the Navy for and in behalf of the United States of America.

MR. WAGNER: We offer in evidence the last above-mentioned contract.

(Marked "Plaintiff's Exhibit A.")

(Copy follows):



“UNITED STATES OF AMERICA.  
NAVY DEPARTMENT.

Washington, Oct. 17, 1921.

I HEREBY CERTIFY that the annexed copy of a contract entered into the 4th day of September, 1918, by and between READING STEEL CASTING COMPANY, Reading, Pa., and the Post Quartermaster, Marine Barracks, Quantico, Va., is a true copy of a copy (original on file in the office of Auditor for the Navy Department) on file in the office of the Quartermaster, United States Marine Corps, Headquarters, Washington, D. C.

JOHN A. LEJEUNE,  
*Major General Commandant,  
U. S. Marine Corps.”*

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“OFFICE OF THE SECRETARY.

I HEREBY CERTIFY that John A. Lejeune who signed the foregoing certificate, was at the time signing Major General Commandant, U. S. Marine Corps, and that full faith and credit should be given his certification as such.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the Navy Department to be affixed this twenty-second day of October, one thousand nine hundred and twenty-one.

R. E. COONTZ,  
*Acting Secretary.”*

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“N.M.C. 507-QM. (Revised) (Actual Damages).

Adv. Opened, August 27, 1918.

Awarded “ “ “

Bond: Corporate. Reqn.

Contract No. File No.... Prepared LHL.

Verified, S. Copied, JFB. Compared DDW  
& JWS.

CONTRACT FOR SUPPLIES OR SERVICES,  
U. S. MARINE CORPS.

THIS CONTRACT, of two parts, made and entered into this 4th day of September, A. D. 1918, by and between READING STEEL CASTING COMPANY, Reading, Pa., of the first part, and the Post Quartermaster, United States Marine Corps, Marine Barracks, Quantico, Va., or his representative, acting under the direction of the Secretary of the Navy, for and in behalf of the United States of America, of the second part;

WITNESSETH: That for and in consideration of the payments hereinafter specified the party of the first part, for itself and its personal and legal representatives, successors, and assigns, does hereby covenant and agree by and with the party of the second part, as follows, *viz*:

1. That the said party of the first part shall furnish and deliver, at its own risk and expense, at the place and within the time hereinafter specified, the following, *viz*..:

(SCHEDULE #Q-178.)

Item No. One (1) Fly wheel, cast in halves, as  
1 per blue print FHB-322, to be cast in  
the rough, at 11 1-2 cents per lb.....  
One (1) Fly wheel, cast in halves, as  
per blue print FH-549, to be cast in  
the rough, at 11 1-2 cents per lb.....

To include pattern equipment for the above  
Fly wheels.

DELIVERY.

Delivery of the flywheels is to be made f. o. b. Reading, Pa., shipment to be made within eight (8) weeks from August 3, 1918, on Government bill of lading No. M-23602-19 addressed to the De La Vergne Machine Company, of New York City, shipment of the pattern equipment to be

made f. o. b. Reading, Pa., on enclosed Government bill of lading No. M-23603-19 at the earliest practicable date, addressed to the Post Quartermaster, Marine Barracks, Quantico, Va.

Priority certificate and number for the manufacture of the above mentioned material, will be obtained and forwarded at the earliest possible date.

2. That the said party of the first part shall furnish the foregoing-mentioned article, articles, or services in strict and full accordance with the requirements of the specifications therefor, a true and correct copy of which specifications is attached hereto and forms part of this contract, and the proposal of the party of the first part, which proposal shall be deemed and taken as forming part of this contract with like operation and effect as if the same were incorporated herein; it being understood and agreed by the party of the first part that the article, articles, or services furnished hereunder shall, upon delivery or completion, and as a condition to the acceptance thereof, be inspected, examined, and approved by the officer or officers authorized by the party of the second part to inspect and examine same; any article, articles, or services not so approved will be rejected and shall be removed by, and at the expense of, the party of the first part immediately after the receipt of written notification of such rejection.

3. That the party of the first part further covenants and agrees to hold and save, keep, bear harmless, and full indemnity the United States, and any of its officers, from all damage or claims for damages, costs, or expenses in law or equity that may at any time arise or be set up for any infringement of the patent right, copyright, or

trade mark of any person or persons in consequence of the use by the United States, or by any of its officers or agents of articles to be supplied under this contract and of which the contractor is not the patentee or assignee or lawfully entitled to sell the same, its officers, agents, servants, and employees, harmless from and against all and every demand, or demands, of any nature or kind, for or on account of the use of any patented invention, article, or appliance included in the article, articles, or services hereby agreed to be furnished under this contract.

4. It is an express condition of this contract that no Member of or Delegate to Congress, nor any person belonging to or employed in the Naval Establishment, shall be admitted to any share or part of this contract or to any benefit to arise herefrom, except as a member of a corporation; that this contract shall not, nor shall any interest herein, be transferred by the party of the first part to any other person or persons; and that, in the performance of this contract, no persons shall be employed who are undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction.

5. If the party of the first part shall fail to deliver the article or articles or perform the services contracted for hereunder, by and at the time and place specified herein, the Quartermaster, or his representative, may waive the time limit and permit the party of the first part to finish the contract within a reasonable period, to be determined by the Quartermaster, or his representative. Should the original time limit be thus waived, all expenses for inspection and superintendence, including all necessary traveling expenses in con-

nection therewith, and all other actual expenses and damages to the United States due to delay beyond the time prescribed for completion, shall be deducted from any payments due or to become due the party of the first part: PROVIDED, That such delay shall not have been caused by the act of the party of the second part, by strikes, fire, riots, or other disaster, delays in transit or in delivery on the part of transportation companies, or by other circumstances beyond the control of the party of the first part, but such circumstances shall not be deemed to include delays on the part of subcontractors in furnishing materials when such delays arise from causes other than those herein specified;

AND PROVIDED, FURTHER, That the amount of such actual expenses and damages, and the question whether delays are due to the causes herein specified, shall be determined by the Quartermaster, and shall be accepted by the parties hereto as final. But such waiver of the time limit and remission of charges shall in no manner affect the rights and obligations of the parties under this contract.

6. It is further covenanted and agreed that if the said party of the first part shall fail in any respect to perform the contract the same may, at the option of the United States, be declared null and void, without prejudice to the right of the United States to recover for defaults therein or violations thereof; or the said party of the second part may purchase or procure in such manner and from such person or persons as he deems proper, paying such price therefor as may be necessary in order to procure the same, such of said articles or materials of the kind specified as near

as practicable, or procure the performance of such services, as the said party of the first part shall fail to deliver or perform as required, and may demand and recover from the said party of the first part the difference between the price so paid therefor and the price stipulated in this contract; and the party of the first part hereby agrees to pay the amount of such difference to the party of the second part on demand, it being understood that no deductions for delays shall be made in accordance with the preceding clause hereof from the price of any article or value of any services after same shall have been otherwise delivered or procured as provided in this clause.

And this contract further witnesseth, that the party of the second part, for and in consideration of the foregoing stipulations, does hereby covenant and agree to and with the party of the first part as follows *viz.*:

7. That for the supplies or services furnished, delivered, and accepted under this contract, he will pay, or cause to be paid, to the party of the first part the amounts due at the foregoing rates upon presentation of the customary bills and proper evidence of delivery, completion, inspection, and acceptance thereof at the place or places designated.

8. That no payments shall be made on any item until all the articles or services embraced in such item shall have been delivered or performed and accepted, except at the option of the said Quartermaster, or his representative;

PROVIDED, That in case of contracts involving materials and labor, ten percentum will be withheld from the amount of each payment as security for the full completion and performance of the

covenants and agreements made by the said party of the first part, who shall, when the entire work to be performed under this contract shall have been accepted, be entitled to receive the aggregate amount of such reservations; but such reservations shall not be withheld from payments on items for materials and labor unless at the option of the said Quartermaster.

9. Subject to the conditions enumerated in section 2 of the eight-hour law of June 19, 1912, no laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work. For each violation of this provision a penalty of five dollars shall be imposed for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work, and the amount of any such penalties shall be withheld for the use and benefit of the United States from any moneys becoming due under this contract, whether the violation of this provision is by the contractor or any subcontractor.

10. In addition to the ordinary precautions heretofore adopted by the party of the first part for the guarding and protection of its plant and work, the party of the first part shall provide such additional watchmen and devices for protection of its plant and property and the work in process under this contract against espionage, acts of war, and of enemy aliens as may be required by the Secretary of the Navy.

The party of the first part shall, when re-

quired, report to the Secretary of the Navy the citizenship, country of birth, or alien status of any and all employees; when required by the Secretary of the Navy, shall refuse to employ or, if already employees, forthwith discharge from employment and exclude from works, any person or persons designated by the Secretary of the Navy for cause as undesirable for employment on work for the Navy Department.

11. The Government reserves the right to have its inspectors visit or be stationed in the factories of the contractor for hats, caps, textiles, shoes, rubber goods, etc., while in process of manufacture.

12. It is understood and agreed that all work required in carrying out this contract shall be performed in full compliance with the laws of the State, Territory, or District of Columbia where such labor is performed: PROVIDED, That the contractor shall not employ in the performance of this contract any minor under the age of 14 years or permit any minor between the ages of 14 and 16 years to work more than eight hours in any one day, more than six days in any one week, or before 6 a. m. or after 7 p. m. Nor shall the contractor directly or indirectly employ any person undergoing sentence of imprisonment at hard labor which may have been imposed by a court of any State, Territory, or municipality having criminal jurisdiction; PROVIDED, HOWEVER, That the President of the United States may by Executive Order, modify this provision with respect to the employment of convict labor and provide the terms and conditions upon which such labor may be employed. This provision shall be of the essence of this contract.



13. The contractor expressly warrants that he has employed no third person to solicit or obtain this contract in his behalf, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that he has not paid, or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commission, or percentage upon the amount receivable by him hereunder; and that he has not, in estimating the contract price demanded by him, included any sum by reason of any such brokerage, commission, or percentage; and that all moneys payable to him hereunder are free from obligation to any other person for services rendered, or supposed to have been rendered, in the procurement of this contract. He further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the United States, and that the United States may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission, or percentage so paid, or agreed to be paid: *Provided, however, It is understood that this covenant does not apply to the selling of goods through a bona fide commercial representative employed by the contractor in the regular course of his business in dealing with customers other than the Government and whose compensation is paid, in whole or in part, by commissions on sales made, nor to the selling of goods, through established commercial or selling agents or agencies readily engaged in selling such goods.*

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their names the day and year first above written. (See note.)

SIGNED AND SEALED

IN THE PRESENCE OF:

READING STEEL CASTING  
PANY,

Edna M. Ross as to M. G. MOORE, *Vice-President*  
(Seal)

Edna M. Ross J. TURNER MOORE, *President*  
(Seal)

C. D. Sniffin as to H. L. ROOSEVELT, (Seal)  
*Lieut.-Col., A. Q. M., U. S. M. C.,*  
*Post Quartermaster."*

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“(Note): Contracts signed by a firm must be duly signed in the firm name by a member of the firm. Contracts signed by a corporation must be signed in the corporate name by the duly authorized officer of the corporation and sealed with the corporate seal. Evidence of such authority must be appended to the contract. Indicate capacity of signed, as “Member of Firm,” “President,” “Treasurer,” etc. Persons signing contracts as “agent” must also file evidence of authority to do so. ~~All signatures must be witnessed.~~ Please return promptly.”

By MR. WAGNER:

Q. Have you ever seen the original or a copy of that contract before?

A. Yes, I saw a copy.

Q. Do you know to what transaction that contract refers?

MR. WADE: That is objected to. The contract speaks for itself, and the contract is here.

THE COURT: I did not understand that to be the purpose of the question, but whether he knew of the subject matter of the contract?

MR. WADE: Oh, yes.

THE WITNESS: Yes.

By MR. WAGNER:

Q. What negotiations, if any, had you prior to the date of that contract?

MR. WADE: That is objected to, if your Honor please.

MR. WAGNER: That is, with the Reading Steel Casting Company.

THE COURT: Why are we concerned with that; all negotiations that related to the contract were merged in the contract.

MR. WAGNER: But, if your Honor please, a clause in the contract provides that all proposals—I will read from paragraph 2:

“That the said party of the first part shall furnish the foregoing mentioned article, articles or services in strict and full accordance with the requirements of the specifications therefor, a true and correct copy of which specifications is attached hereto and forms part of this contract, and proposal of the party of the first part, which proposal shall be deemed and taken as forming part of this contract with like operation and effect as if the same were incorporated herein.”

THE COURT: Very well; are you proposing to show what the proposal was?

MR. WAGNER: I am.

THE COURT: Very well, just offer it in evidence as part of the contract.

I sustain the objection subject to this quali-

fication, that the plaintiff may show, and offer in evidence, the proposal leading up to the contract, which, by the terms of the contract, is incorporated in and made part of the contract. Exception is allowed to the plaintiff insofar as the objection is sustained, and to the defendant insofar as it is overruled.

By MR. WAGNER:

Q. Did you go to the office of the Reading Steel Casting Company during the first part of August with reference to the subject matter of this contract?

A. Yes.

Q. On whose order, at whose direction?

A. The Chief of the Bureau of Navigation.

Q. Have you an order to that effect?

A. Yes, dated August 1st.

MR. WAGNER: We offer in evidence this order—

MR. WADE: I object to that paper in evidence.

THE COURT: You will have to enlighten me as to its relevancy.

MR. WAGNER: If your Honor please, the entire contract was negotiated through Mr. Dechant.

THE COURT: Let me ask you first, is this subsequent or precedent to the contract?

MR. WAGNER: Precedent.

THE COURT: You will have to show me its relevancy. You might state, upon the record, for what purpose it is offered, so as to disclose its relevancy; just make a statement of the grounds upon which you base your proposition of its relevancy.

MR. WAGNER: The letter of instruction, dated August 1, 1918, from the Chief of the Bureau of

Engineering, to F. H. Dechant, is offered in evidence on the ground that the contract was negotiated through Lieutenant Dechant, and this letter is evidence of his authority to proceed to Reading to carry on the negotiations which led up to the execution of the contract.

THE COURT: Offered for that evidence, it would have relevancy except for the fact that the contract itself is already in evidence without objection, and in consequence, the question of the authority to make it is of no importance to us.

MR. WAGNER: The letter may become important afterward.

THE COURT: If it does, we will hear it, but for the present, I don't think it has any relevancy.

MR. WAGNER: I call upon the defendant to produce letter dated August 3, 1918, from the Reading Steel Casting Company to the Public Works Officer, at Quantico, Virginia.

(Letter called for produced.)

By MR. WAGNER:

Q. Did you receive that paper while Public Works Officer at Quantico, Virginia (handing letter to witness)?

A. I was not Public Works Officer there; I was Assistant Public Works Officer.

Q. Do you know, of your own knowledge, whether that came into the office of the Public Works Officer at Quantico, while you were assistant there?

A. Yes.

MR. WAGNER: I offer this letter in evidence.

MR. WADE: Objected to.

THE COURT: Is it still antecedent to the contract?

MR. WAGNER: Yes, but it is a definite letter of proposal.

THE COURT: I will ask you to state the ground upon which you assert its relevancy.

MR. WAGNER: The letter of August 3d, 1918, from the Reading Steel Casting Company to the Public Works Officer, Quantico Marine Barracks, Quantico, Virginia, is offered upon the ground that it contains a proposal which, under the terms of the contract, becomes part of the contract.

MR. WADE: That is while the matter is still in the course of negotiation. Then, the whole matter is merged in the contract, finally. Now, if that is part of the plan and specification that is referred to by the contract, it would be made part of the contract. I have no objection to that, and could not have; but I don't see how it is part of the plan referred to in the contract.

THE COURT: What counsel says is, it is a proposal which is referred to in the contract, and which, by the express terms of the contract, is made part of the contract.

With the understanding that counsel is proposing to show by this witness that the paper dated August 3, 1918, is a proposal referred to in the contract, which, by the terms of the contract is made part of the contract, the objection is overruled and an exception noted for the defendant.

(Marked "Plaintiff's Exhibit B.")

(Copy follows):

"READING STEEL CASTING COMPANY,

Reading, Pa., August 3, 1918.

Public Works Officer,  
Quantico Marine Barracks,  
Quantico, Va.

Care of Assistant Public Works Officer.

Dear Sir:

In accordance with the verbal understanding

had with your Assistant, we can promise shipment to the De La Vergne Machine Company of the two fly wheels as shown on their drawings FHB-322 and FH-549, within eight weeks from date of receipt of formal order, blue prints and all other information required.

These wheels will be made of cast steel and of such dimensions as to allow for proper finishing, as shown on the drawings.

We estimate the price per pound of the rough castings not to exceed eleven (11) cents per pound, F. O. B. Reading, Pa., and the patterns not to exceed \$240.00, the patterns to become your property providing you give us shipping instructions for same after completion of the order.

The above estimate is based upon our furnishing the castings of a material which will be in accord with the Navy Department or American Society for Testing Materials' specifications but which will not be inspected before shipment at this plant. However, if requested to do so, we will advise your Assistant when these castings are ready for shipment, so that he can check them up and witness our heat tests before shipment.

Yours truly,

J. TURNER MOORE,

*President.*

JTM:S''

MR. WADE: I want to call your Honor's attention to the second paragraph again. I think if you have that paragraph in mind, that your Honor will change the ruling as regards this letter, because the contract says clearly that the proposals, plans and specifications referred to in this contract are the set of blue prints which have been

furnished, and it says "attached to the contract and made part thereof."

I understand that there is but one set of blue prints, and they are in the plaintiff's possession. Therefore, if your Honor please, the burden is on the plaintiff to produce those plans and specification; when it says "furnished and attached to the contract," it does not refer to these letters at all.

THE COURT: I will permit you now to strike out the contract because it appears now that it was not complete, and to object to it unless the plans and specifications and proposals which, together, make up the complete contract, are all offered.

MR. WADE: I move to strike out the contract as offered in evidence——

MR. WAGNER: In the first place, your Honor, the contract does not provide that the proposals shall be attached to the contract.

THE COURT: But, it does make them part of it, as I understand it.

MR. WAGNER: That is correct. The contract which was offered was a certified copy of the contract which was produced by the defendant. The only copy of the blue prints which were attached to the contract, which I have knowledge of, are the blue prints which were attached to the statement of claim produced by the plaintiff, and I now offer in evidence——

THE COURT: We are on the question of this motion. The motion is allowed with the qualification that the contract may remain in evidence and counsel for the plaintiff be permitted to supplement the evidence already in by now offering the plans, specifications and proposals, which, together, constitute the complete contract.



By MR. WAGNER:

Q. Mr. Dechant, have you ever seen the originals of these blue prints before?

A. From my recollection these were not the same ones, although they look very much like them.

Q. Do you recognize these blue prints (handing blue prints to witness)—are they copies?

A. These are the ones (indicating).

Q. What difference is there between the blue prints you have in your hand and this one?

A. Well, it would take quite a little while to go over all the details. Generally, there is very little difference.

Q. Is there any difference?

A. (After examining plans.) Apparently none.

MR. WAGNER: They are supposed to be alike.

THE WITNESS: They are all right.

By MR. WAGNER:

Q. They are the same?

A. Yes, they are the same.

MR. WAGNER: I offer in evidence copy of blue print "FH-549" and "FHB-322," of the De La Verne, for flywheels, being the blue prints referred to in the contract dated September 4, 1918.

(Marked "Plaintiff's Exhibits C and D" respectively.)

MR. WAGNER: If your Honor please, I offer in evidence letter from the Post Quartermaster, Marine Barracks, Quantico, Virginia, to the Reading Steel Casting Company, dated August 27, 1918, as an acceptance of the proposal stated in the letter to have been submitted with letter of the Post Quartermaster to the Reading Steel Casting Company, under date of August 19, 1918, and referred to in letter of the Reading Steel Casting Company

to the Post Quartermaster at Quantico, under date of August 24, 1918, as part of the contract.

MR. WARD: It is a proposal referred to in the contract?

MR. WAGNER: A proposal referred to in the contract.

MR. WADE: Now, we have the blue print and proposal on record; the contract is complete.

(Marked "Plaintiff's Exhibit E.")

(Copy follows):

"File No. 39233-7-17.

UNITED STATES MARINE CORPS,  
Office of the Post Quartermaster,  
Marine Barracks,  
Quantico, Va., August 27, 1918.

Sirs:

In reference to letter of this office of the 19th instant, wherein were submitted blue prints for fly wheels, and your letter of the 24th instant, wherein you offer to furnish the Marine Corps with this material, be informed that your offer is hereby accepted as follows, *viz.*: (Schedule "-178).

Item No.

- 1      One (1) fly wheel, cast in halves, as per blue print FHB-322, to be cast in the rough at 11½ cents per pound.....
- One (1) fly wheel, cast in halves, as per blue print FH-549, to be cast in the rough at 11½ cents per pound.....

To include pattern equipment of the above fly wheels.

This award is made with the understanding that delivery of the fly wheels is to be made f o. b. Reading, Pa., shipment to be made within eight (8) weeks from date of August 3, 1918, on enclosed Government bill of lading No. M-23602-19, to the De La Vergne Machine Co., of New York

City for the account of the Post Quartermaster, Marine Barracks, Quantico, Va., shipment of the pattern equipment to be made f. o. b. Reading, Pa. on enclosed Government bill of lading No. M-23603-19, at the earliest practicable date, addressed to the Post Quartermaster, Marine Barracks, Quantico, Va.

Priority certificate and number for the manufacture of the above mentioned material, will be obtained and forwarded to yourselves at the earliest possible date. In addition, it is requested that this office be informed of the date of the shipment of this material to the De La Vergne Machine Company.

Enclosed herewith are forms of contract and bond covering this award, which it is requested you execute in strict accordance with instructions at top of page one (1) of the bond form and return to this office at the earliest practicable date. In due course a copy of the completed contract will be forwarded to you.

Kindly acknowledge receipt of this communication,

Very respectfully,

H. C. ROOSEVELT,

*Lieut. Colonel, A. Q. M.*

*U. S. M. C. Post Quartermaster,*

Reading Steel and Casting Company,  
Reading, Pa."

THE COURT: How about the specifications?

MR. WADE: They are in the blue print.

MR. WAGNER: One of the officers of the Government stated that the letter of August 24th is attached to the original contract. Copy of that letter was never furnished to the plaintiff, nor is

it attached to the certified copy of the contract which the defendant produced upon call.

The plaintiff will, therefore, as I understand it, be entitled to introduce oral evidence as to the contents of those letters.

THE COURT: No carbon copy.

MR. WADE: I object to any oral testimony in regard to the letters.

THE COURT: You understand counsel is now in this position. He has interposed objection to the contract until you make the contract complete in your offer. Have you got it complete, as yet?

MR. WAGNER: As far as I can. However, there are certain letters referred to which are evidently part of the proposal. One copy I want, I understand, is attached to the original in Washington.

MR. WADE: There was a mass of correspondence between the Reading Steel Casting Company and the Quartermaster, and it all resulted in an acceptance, and here is the acceptance of the proposals.

THE COURT: Are you standing on anything other than what is in that letter?

MR. WAGNER: I am. I understand—I have been informed that the letter of proposal—there are letters which passed between the two parties containing certain specific conditions which are not contained in any of these letters, and the reason I called upon the defendant for the production of that is because I had no evidence of that myself.

THE COURT: Call upon them for the letter, and if they are unable to produce it, you may introduce secondary evidence of its contents.

MR. WAGNER: I have been unable to find it, but I know it was written, because it is referred to in these letters.

THE COURT: If there is a copy of it of record

in the department at Washington, why can't you stipulate that it may be copied upon the record, and submit it to the stenographer.

MR. WADE: I will get it, if it is there.

MR. WAGNER: But, if it is not there, I am in the position of not having anything upon the record with reference to the contents of that letter.

THE COURT: It is now time to take a recess. Can't you call up the department at Washington, ask them to get the letter, and then dictate the contents of it to one of the stenographers in the District Attorney's office?

MR. WADE: We will do that, your Honor.

(Recess taken until 2 o'clock P. M.)

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Two P. M. Trial resumed.

Present: The Court.

Appearances: As before noted.

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MR. WAGNER: If your Honor please, we have been unable to secure a copy of the letter of the 24th that we were discussing before recess. Therefore, we will continue to take the evidence and put in that letter as soon as it can be secured.

MR. WADE: We called up Washington, your Honor, and they were going to get busy and go to the file, and read the letter back to us; but up to this time, they have not done so. I suppose it will come in sometime during the afternoon.

THE COURT: Just offer that letter in evidence, and hand it to the stenographer when it comes in, so that he may spread it on the record.

MR. WAGNER: I offer in evidence letter from the Reading Steel Casting Company to the Post

Quartermaster, Marine Barrack Quantico, Virginia, dated August 24, 1918, to which the letter of August 27, 1918, from the Post Quartermaster, is a reply.

(Marked "Plaintiff's Exhibit F.")

(Copy follows):

“READING STEEL CASTINGS COMPANY.

Reading, Penna., August 24, 1918.

Navy Department,  
Bureau of Yards and Docks,  
Quantico, Va.  
Gentlemen:

We are in receipt of your favor of the 19th inst. over the signature of Mr. H. G. Roby, Civil Engineer, in connection with the two fly wheels required, upon which we submitted a preliminary quotation on August 3d.

We find that the pattern cost will amount to about one-half cent per pound. We would, therefore, be pleased to quote you on one fly wheel cast in halves and as per blue print FHB-322 and one fly wheel cast in halves and as per SH-549, a price of 11½ cents per pound in the rough, f. o. b. Reading, Penna. This price covers the rough castings; also the necessary pattern equipment, which pattern equipment will be your property providing you will give us shipping instructions for the same upon the completion of the order; otherwise, it will be destroyed.

After delivery, in view of the urgency of the case, we will use every possible effort to complete shipment eight weeks from August 3rd. We are afraid, however, unless the order is prepared immediately, this delivery will be an impossibility. You can be assured, however, of our best efforts, providing the prints in our possession are final.

We would request that you wire your preliminary instructions to proceed with the order, providing you wish us to produce these castings for you.

Very truly yours,

(Signed) J. TURNER MOORE,  
*President.*

JTM:S''

MR. DECHANT, recalled.

By MR. WAGNER:

Q. I hand you a letter dated August 3d, Plaintiff's Exhibit "B," the first sentence of which says: "In accordance with the verbal understanding had with your Assistant"—

MR. WADE: That is objected to, if your Honor please.

THE COURT: You are still antecedent to the contract. Objection sustained.

(Exception noted for plaintiff, by direction of the Court.)

MR. WAGNER: I would like to make an offer of proof. This question is for the purpose of proving that the terms of the contract are such that the proposals shall constitute part of the contract, and the proposals refer to verbal understandings as between the officer of the United States Government and the plaintiff.

THE COURT: Is that objected to?

MR. WADE: Yes.

THE COURT: Sustained.

(Exception noted for the plaintiff, by direction of the Court.)

By MR. WAGNER:

Q. What inspections, if any, were made by you of the castings or patterns to be manufactured under this contract, and upon what authority?

A. I received authority from the Bureau of Navigation, first, to inspect the patterns.

Q. When did you receive that authority?

A. I will have to look that up in these papers.  
(After examining papers.) September 9, 1918.

By MR. WADE:

Q. What was that date?

A. September 9, 1918.

MR. WAGNER: I offer in evidence orders from the Chief of Bureau of Navigation to Ensign Frederick H. Dechant, dated September 9, 1918, with four endorsements attached.

(Marked "Plaintiff's Exhibit G.")

(Copy follows):

“NAVY DEPARTMENT,  
BUREAU OF NAVIGATION.

In reply refer to No. 32649  
N-33-RMP.

Washington, D. C., September 9, 1918.

To Ensign Frederick H. Dechant,  
Civil Engineer Corps, USNRF,  
Marine Camp of Instruction,  
Quantico, Va.

(Commanding Officer.)

Subject: Temporary additional duty.

1. Proceed to the place (or places—in the order given) indicated below, for temporary duty. This is in addition to your present duties and upon the completion thereof you will return to your station.

Reading, Pa., in connection with the inspection and checking of the patterns for the cast steel fly wheels that are being made by the Reading



Steel Casting Company for the new power plant at Quantico, Va.

S. C. PALMER,  
*Rear Admiral,*  
*U. S. Navy, Chief of Bureau.*

(Confirming oral instructions.)

NOTE: Attention is invited to Article 702, Instructions to Navy Regulations, 1913.

Copy to Bureau of Yards and Docks.

Received—Marine Barracks, Quantico, Va.,  
Sept. 24, 1918. F. H. Dechant.

Endorsements: Paid Mileage \$34.08. Asst. Paymaster's Office. U. S. Marine Corps, Quantico, Va., Sept. 26th, 1918.

From: Marine Barracks, Quantico, Va., to Reading, Pa., and return. J. E. Reich, Assistant Paymaster, U. S. M. C., Captain.

Office of the Commander. Received Sept. 21, 1918, 1096-D, Quantico, Va.

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1096-D CW 1st endorsement September 23, 1918.  
Office of the Post Commander, Marine Barracks,  
Quantico, Va.

From: The Post Commander.

To: Ensign Frederick H. Dechant, U. S. N. R. F.

Via: Commanding Officer, Supply Detachment.

Subject: Temporary additional duty.

1. Forwarded for delivery.

W. S. HOODLE, By direction.

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2nd Endorsement. September 23, 1918.  
Office of the Post Commander, Marine Barracks,  
Quantico, Va.

From: Commanding Officer, Supply Detachment.

To: Ensign Frederick H. Dechant, U. S. N. R. F.

1. Delivered this date.

C. D. SNIFFEN.

FHD-C #684. 3rd Endorsement.

September 25, 1918.

Office of the Public Works Officer, Bureau of  
Yards and Docks, Quantico, Virginia.

From: Assistant Civil Engineer, F. H. Dechant,  
USNRF.

To: Bureau of Supplies and Accounts, Washing-  
ton, D. C.

Subject: Mileage.

1. Left Quantico, Va., 2:34 p. m. Sept. 9, 1918.

Arrived Reading, Pa., 1:10 a. m. Sept 10, 1918.

left Reading, Pa., 3:00 p. m. Sept. 10, 1918.

Arrived Fredericksburg, Va., 10:30 p. m. Sept.  
10, 1918.

Arrived Quantico, Va., 8:00 a. m. Sept. 11, 1918.

F. H. DECHANT,  
*Assistant Civil Engineer,*  
*USNRF.*

HGR-C. 687. 4th Endorsement.

September 25, 1918.

Office of Public Works Officer, Bureau of Yards  
and Docks, Quantico, Virginia.

From: Public Works Officer.

To: Assistant Civil Engineer F. H. Dechant,  
USNRF.

Subject: Orders.

1. Reported at Quantico for duty, September  
11, 1918, at 8:00 A. M.

H. G. ROBY,  
*Civil Engineer, USNRF.*  
*Public Works Officer.*

Paymaster's Department, U. S. Marine Corps.  
Received Sept. 25, 1918. Quantico, Va."

By MR. WAGNER:

Q. What did you do, in accordance with those  
orders?

A. I went to Reading and checked the patterns

against the blue prints, for the wheels—with the blue prints in evidence.

Q. Were those patterns to be made in accordance with those blue prints?

A. Yes.

Q. And were they made in accordance with the blue prints?

A. Yes, sir.

Q. What further inspection, if any, was made by you of the patterns or the wheels?

MR. WADE: At the same time?

MR. WAGNER: At the time of this inspection, I understand, the wheels had not been manufactured.

THE WITNESS: No. The patterns were manufactured, however, at that time.

By MR. WAGNER:

Q. Who supplied the blue prints?

A. The De La Vergne Machine Company.

Q. At a subsequent date, did you make any inspection of any other pattern of flywheel?

A. At a subsequent date, I inspected the first casting off of these patterns, in the plant of the De La Vergne Machine Company in New York.

Q. You spoke of the first casting. That was in accordance with which of these two blue prints?

A. I am not absolutely positive, but I think it was the smaller of the two; that would be "FHB-322," I think.

By MR. WADE:

Q. That is the larger one?

A. That is correct, "FHB-549."

Q. Which one did you inspect?

A. "FH-549," that smaller one.

By MR. WAGNER:

Q. The smaller one only was inspected at that time?

A. Yes, sir.

Q. What date was that?

A. Why, about February 8th or 9th.

Q. Had you any authority to make such inspection?

A. I had orders, dated February 7th, to make such an inspection, from the Chief of Bureau of Navigation.

MR. WAGNER: I offer in evidence orders from the Chief of Bureau of Navigation to Lieut. F. H. Dechant, dated February 7th, 1919, with four endorsements attached.

(Marked "Plaintiff's Exhibit H.")

(Copy follows):

"NAVY DEPARTMENT.

Bureau of Navigation.

In reply refer to No. N-33-RH-DT.

32640.

Washington, D. C., February 7, 1919.

To: Lieutenant (j. g.)

F. H. Dechant, USNRF, Marine Barracks,  
Quantico, Va.

(Commanding Officer.)

Subject: Temporary additional duty.

1. Upon receipt of this order you will proceed to the place (or places—in the order given) indicated below for temporary duty. This is in addition to your present duties and upon the completion thereof you will return to your station.

New York, N. Y., in connection with inspection of mounting of fly wheels for Power Plant for Marine Barracks, Quantico, Va.

VICTOR BLUE,  
Rear Admiral, U. S. Navy,  
Chief of Bureau.

NOTE: Attention is invited to Article 702, Instructions to Navy Regulations, 1913.

Copy to: Bureau of Yards and Docks.

Paid Mileage \$4192. Asst. Paymaster's Office, U. S. Marine Corps, Quantico, Va., Feb., 1919.

From Marine Barracks, Quantico, Va., to New York, N. Y., and return.

Captain, Assistant Paymaster U. S. M. C.

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1096-D-re. 1st Endorsement. February 12, 1919.  
Office of the Post Commander, Marine Barracks,  
Quantico, Va.

From: The Post Commander.

To: Lieutenant (j. g.) F. H. Dechant, USNRF.

Via: Post Quartermaster.

Subject: Temporary additional duty—Lieutenant  
F. H. Dechant.

1. Forwarded.

B. VAN MOSS, By direction.

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Copy for Post Paymaster.

6221-3-9. 2nd Endorsement. February 13, 1919.  
Office of the Post Quartermaster, Marine Barracks,  
Quantico, Va.

From: Post Quartermaster.

To: Lieutenant (J. G.) F. H. Dechant, USNRF.

1. Forwarded.

C. D. SNIFFIN.

Paymaster's Department, U. S. Marine Corps. Received Feb. 17, 1919. Quantico, Va.

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1180. 3rd Endorsement. Feb. 15, 1919.  
Office of the Public Works Officer, Marine Barracks,  
Quantico, Va.

1. Received this date.

F. H. DECHANT.

1181.           4th Endorsement.           Feb. 15, 1919.  
Office of the Public Works Officer, Marine Barracks, Quantico, Va.

1. Returned to duty, Feb. 10, 1919, at 8 A. M.  
F. H. DECHANT."

By MR. WAGNER:

Q. These orders stated that you were to proceed to New York, in connection with the inspection of mounting of flywheels for power plant for Marine Barracks, Quantico, Virginia. What does that mean?

MR. WADE: I would like him to explain what he did in pursuance of that order.

THE COURT: You are not trying this case before a jury. This witness evidently knows what he is doing—what he is talking about. It saves time to ask direct questions, not to make them leading, but to ask direct questions. That is what I want him to do, because it saves time. This witness knows the subject matter, and you can get right to the "teeth" of it.

By MR. WAGNER:

Q. What is the meaning of that phrase, Mr. Dechant?

A. I cannot explain just what was meant—just what was in the mind of the man that wrote this when he said "mounting of flywheels," but I will tell you what I did.

I went up to the De La Vergne machine shop and found two half castings on the floor, showing some checks.

Q. "Showing some checks"; what does that mean?

A. Cracks, some of the checks being at a point midway between the spokes on the inner part of the rim, and others being at the point where the spokes join the rim, and one, I believe, being near the hub. That is as near as I can recollect.

My recollection is that we instructed the De La Vergne Machine Company to get a party's price on welding those checks, in New York.

I got that price and returned to the Post, and I think I wrote a letter to the Post Quartermaster, or to the Reading Steel Casting Company, sending a copy to the Post Quartermaster, describing the fact that there were some checks apparent in this wheel; that is, the two halves, which should be repaired before final machining.

MR. WAGNER: I call upon the defendant to produce letter of February 17th, 1919, from the Public Works Officer to the Post Quartermaster.

(Letter produced.)

Q. Is this the letter (handing letter to witness)?

A. This is one letter, but I wrote another letter.

Q. Of the same date?

A. You have it in your file, Mr. Sniffen.

MR. WAGNER: I offer in evidence letter of February 10th, 1919—that is, a copy—from Lieutenant Dechant to the Reading Steel Casting Company, it being impossible to obtain the original.

(Marked "Plaintiff's Exhibit I.")

(Copy follows):

"February 10, 1919.

Gentlemen:

The undersigned, having been sent to New York for the purpose of inspecting the small steel fly wheel, finds as follows:

(a) That after turning down the sides of the rim, cracks were discovered extending the full width of the rim on both sides of the rim and on the center line of both arms of the wheel on both halves; in other words a crack caused probably by shrinkage, extends part way through the rim from

both sides towards the center of the rim at each spoke.

(b) A crack similar to those in the rim is also apparent at the hub and at the link-mortise of one-half.

While at the factory of the De La Vergne Machine Company it was determined that the Thermit Welding Company estimated the cost of weldings these cracks for one wheel at \$10000.00 and the De La Vergne Machine Company estimated the cost of setting links in the rim at each spoke to be about \$1300.00.

It is believed that you should send an inspector to New York to see the small wheel and decide, first, whether you will replace the casting or what manner of repairs should be made inasmuch as it is believed that the casting in its present condition is not safe although the centrifugal strain in the rim amounts to about 3000 lbs. per square inch as estimated by the De La Vergne Machine Company.

The casting for the large wheel has not been finished so that it is not possible at this time to say whether it is cracked or not. You are directed to take immediate action in this matter in order that already long delays to this work will not be extended.

Yours very truly,

LIEUT. F. H. DECHANT,

*Lt. C. E. C. U. S. N. R. F.*

To: The Reading Steel Casting Co.,  
Reading, Pa."

By MR. WAGNER:

Q. In that letter it was stated there was an estimate of the Thermit Welding Company, of \$10,000 for welding these cracks. Is that a true copy of that letter, so far as that particular amount is concerned?



A. My judgment is, that that is a typographical error. It was \$1000, to my recollection.

MR. WADE: Perhaps that is a little unfair to say it is not a true copy of the original. You don't mean to say that, do you?

THE WITNESS: No, I mean insofar as that amount is concerned.

MR. WADE: You will admit that it is a true copy of the original letter sent, but that the \$10,000 is an error in the original letter as well as in the copy?

THE WITNESS: Yes.

MR. WAGNER: I offer in evidence the letter from Mr. Dechant to the Public Works Officer, Quantico, Virginia, dated February 17th, 1919, to which is attached copy of letter to the Reading Steel Casting Company—I mean to say, to which is attached a letter from the Reading Steel Casting Company, signed by Mr. J. Turner Moore, to Lieutenant Dechant, dated February 15, 1919.

(Said letters marked "Plaintiff's Exhibits J. and K.")

(Copies follow):

"In reply refer to Public Works Officer, 1195.

NAVY DEPARTMENT,

Bureau of Yards and Docks,

Quantico, Virginia, Feb. 17, 1919.

From: The Public Works Officer.

To: The Post Quartermaster.

Subject: Steel fly wheels for electric power plant.

1. Transmitted herewith is a copy of letter from the Reading Steel Casting Company received this date relative to the return shipment of fly wheels. It is noted that request is made for the way-billing of the fly wheels as scrap which request was not made by telephone on the 14th inst.

*F. H. Dechant*

2. It is respectfully recommended that the suggestions of the Reading Steel Casting Co., be followed and this office is of the opinion that an entirely satisfactory result will be obtained.

F. H. DECHANT.

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READING STEEL CASTING COMPANY,

Reading, Pa., Feb. 15, 1919.

Lieut. Fred H. Dechant,  
Public Works Officer, Navy Department,  
Quantico, Va.

Dear Sir:

In reference to your letter of the 10th inst., regarding fly wheels recently produced at this plant and confirming conversation of our Vice-President yesterday, we would request that you have these castings returned to us, via freight, way-billing as scrap.

We will arrange to electric weld these castings in a manner which we are positive will be entirely satisfactory to you. We believe that your knowledge of our equipment in this line and the work which we are doing will justify you in deciding to follow the above suggestions.

We are in position to give the matter immediate attention.

Anticipating the pleasure of a favorable reply, we are,

Yours truly,

J. TURNER MOORE, *President.*

JTM-RW.

Certified a true copy."

By MR. WAGNER:

Q. Do you know whether or not the recommendation in that letter of the 17th, that they be returned to the Reading Steel Casting Company, was carried out?

A. Yes, it was.

Q. Did you inspect these wheels at any subsequent date?

A. Yes.

Q. When?

MR. WADE: I don't think that that question and answer is quite fair, because the correspondence up to this time refers to one wheel, and counsel for the plaintiff seems to have the witness answering in regard to "wheels." That is incorrect.

THE WITNESS: I am only thinking of one wheel.

By MR. WAGNER:

Q. Did you inspect this particular wheel at any subsequent date?

A. Yes, sir.

Q. When?

MR. WADE: You are on the small wheel now.

THE WITNESS: Subsequent to February 7th.

THE COURT: Are you up to the question of—

MR. WAGNER: Inspection and acceptance.

THE COURT: That goes to the condition—to the quality of the work.

THE WITNESS: I beg pardon; that was subsequent to April 22d.

By MR. WAGNER:

Q. On April 22d?

A. Around there, April 22d, 23d, or 24th, one or the other. At that time the casting of the larger wheel was at the De La Vergne Company's plant, also, I think.

MR. WAGNER: I offer in evidence orders from the Chief of Bureau of Navigation to Mr. Dechant, dated April 22, 1919, with three endorsements attached.

(Marked "Plaintiff's Exhibit L.")

*F. H. Dechant*

(Copy follows):

“NAVY DEPARTMENT

In reply refer to  
32640-N-33-AW-DT.

Bureau of Navigation,  
Washington, D. C. April 22, 1919.

To: Lieutenant (jg).

F. H. Dechant, Civil Engineer Corps, USNRF,  
Marine Barracks, Quantico, Va.

(Commanding Officer.)

Subject: Temporary additional duty.

1. Proceed to the place (or places—in order given) indicated below, for temporary duty. This is in addition to your present duties and upon the completion thereof you will return to your station:

New York, N. Y., in connection with inspection of fuel oil engines.

VICTOR BLUE,

*Rear Admiral, U. S. Navy,  
Chief of Bureau.*

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NOTE: Attention is invited to Article 702, Instructions to Navy Regulations, 1913.

Copy to Bureau of Yards and Docks.

Paid Mileage, \$4192, from Marine Barracks, Quantico, Va., to New York, N. Y., and return.

FRANK S. FLACH,

*Captain, Assistant Paymaster U. S. M. C.*

Asst. Paymaster's Office, U. S. Marine Corps,  
Quantico, Va. Apr. 1919.

Office of the Post Commander. Received Apr.  
23, 1919, Quantico, Va.

Orders-rec. 1st Endorsement. April 25, 1919.  
Office of the Post Commander, Marine Barracks,  
Quantico, Va.

From: The Post Commander.

To: Lieutenant (jg) F. H. Dechant, Civil  
Engineer Corps, USNRF.

Via: Commanding Officer, Supply Detach-  
ment.

Subject: Temporary additional duty.

1. Forwarded.

R. F. BOYD.

R. F. Boyd, by Direction.

Copy for the Post Paymaster.

Clerk Officers' Name Board.

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2nd Endorsement. April 25, 1919.

Office of the Supply Detachment, Marine Bks.,  
Quantico, Va.,

From: Commanding Officer, Supply Detach-  
ment.

To: Lieutenant (jg) F. H. Dechant, C.E.C.,  
USNRF.

1. Delivered.

H. L. ROOSEVELT.

H. L. Roosevelt.

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3rd Endorsement. April 28, 1919.

Orders received April 28, 9 A. M.

Left Quantico, Tuesday, April 22, 9.20 P. M.

Arrived New York 7 A. M. April 23.

Left New York 4.50 P. M. April 23.

Arrived Quantico, 4.20 P. M. April 25.

Reported for duty 4.20 P. M. April 25.

(1 day stopover en route from New York to  
Quantico on April 24 was granted by the Post

Quartermaster as leave to attend the wedding of my sister.)

F. H. DECHANT.

F. H. Dechant."

By MR. WAGNER:

Q. That order states that you were instructed to go to New York in connection with the inspection of fuel oil engines. What does that include?

A. Well, in order to make it clear, I can best tell everything that was done.

Q. All right; go ahead.

A. About this time we had received two engines, two fuel oil engines at Quantico, and we were considering the purchasing of a third. In that connection, I was sent to the De La Vergne shop to examine a new engine which had just been brought out, embodying certain new principles in connection with the extension of the power house at Quantico; and at the same time it was understood that I would make an inspection of the welded flywheels returned from the Reading Steel Casting Company's shops.

Q. Taking all these orders, and the correspondence together, I want you to tell exactly what you found upon your first inspection and what the condition of the wheel was when it was returned to the De La Vergne Company after having been sent back to the Reading Steel Casting Company, and what your final action upon that wheel was; that is, the small wheel.

A. On the occasion of the first inspection, as I said before, certain checks in the rim or hub of the wheel were found. By an arrangement with the Reading Steel Casting Company, this wheel was returned, and welded, and again shipped back to the De La Vergne Machine Company.

My second inspection of the wheel was before it was machined the second time—I don't mean the second time, but I mean completely—I accepted the wheel as it stood then.

By THE COURT:

Q. What do you mean by "checks"?

A. Cracks in the construction of the wheel, due possibly to a shrinkage of the metal in cooling.

By MR. WAGNER:

Q. Was that wheel as you accepted it in conformity with blue print FH-549?

A. Yes.

Q. Will you look over this contract, and state whether or not the wheel, as accepted by you, was in accordance with the specifications of that contract?

A. Yes, because the specifications in the contract, was this blue print.

Q. Was there any other specification in the contract?

A. No, sir.

Q. In the written contract.

A. In the written contract?

Q. What was the use to which these wheels were to be put?

A. They were primarily for the synchronizing of two generating units operated by direct connected fuel engines, twin cylinder.

There is a short history which may go with that wheel, I think, by way of explanation, in this, that at the time of the purchase of the two fuel oil engines from the De La Vergne Machine Company, we were informed that in order to synchronize the two units which we had purchased, it would be necessary to equip them with cast steel flywheels. Regularly, the De La Vergne Machine Company furnished cast iron flywheels. They imposed upon us—that is, the purchaser—

Q. Whom do you mean by "us"?

A. The purchaser.

Q. Who was the purchaser?

A. The United States—imposed on the United States the business of obtaining the cast steel wheels, and we asked the De La Vergne Machine Company to furnish the drawings. This they did, and the drawings are those which have been submitted in evidence, and the drawings which they submitted, are the drawings of regular cast iron flywheels.

The exact purpose was the maintaining of uniform speed between the two widely varying engines so far as their power rating was concerned.

By MR. WAGNER:

Q. Do you know what wheels, if any, are now in use at Quantico in connection with these particular fuel oil engines?

A. Yes, sir. These wheels were delayed in delivery. The Government was sorely in need of the engines, to be in operation, and we requested that the De La Vergne Machine Company loan us two cast iron flywheels which are regularly furnished with these engines when operating singly, not in parallel, which they did. These wheels were in service at the time of my leaving the Post.

Q. Were they satisfactory?

A. Yes, sir.

Q. What is the relative strength of cast steel wheels and cast iron wheels?

A. One to eight or one to ten.

Q. What does that mean; explain it more definitely?

A. Well, the normal strength of a cast iron wheel of that kind is taken at 2000 pounds per square inch. With the cast steel wheel, you can take an ultimate strength of 16,000 to 20,000 pounds per square inch.

THE COURT: How do you establish the synchronism in movement between the two engines?

THE WITNESS: Well, that is a rather long



story, but I will give you some sort of an explanation, if possible.

If you will consider two alternating current generators standing alongside of each other, each one driven by direct connected engine, one of them is of a certain rated horsepower, and the other is, say, twice its horsepower, or equivalent to horsepower—let us say we start generator one by starting the engine, and we turn it up to speed, at its rated speed—let us assume that the phase of the current is established at three, and there are certain cycles—let us say, 60 cycles, is another crossing of the current—now, then, the generator is in operation and able to deliver power under those characteristics. We come now and start generator No. 2; we must now put generator No. 2 on the circuits set with one, so that the phases carried are at an equal load to one or the other. In other words, they are electrically carried together, and once in step it is hard to throw them out.

That is done by a phase meter, or a phase indicator, which indicates whether the step is fast or slow, and then at the instant when the phases are parallel or opposite each other, the operator plugs in the switch, and they are together. That is the way it is done.

By MR. WAGNER:

Q. Was this flywheel, as finally inspected and passed by you, of sufficient strength to use in connection with the engine purchased from the De La Vergne Machine Company, in your opinion?

A. In my opinion, yes.

Q. What experience have you had with the construction and operation of this particular kind of power house?

A. We have designed and had charge of the construction and starting up of—as near as I can recol-

lect, about eight power plants of internal combustion engine type.

Q. Was this an internal combustion engine type?

A. Yes.

Q. What was your professional experience—

A. I was in charge—

THE COURT: Is this for the purpose of qualifying him?

MR. WAGNER: Yes.

THE COURT: I don't think you need spend any time on that. I have not heard any objection, as yet, to his qualifications, and until they do object, you may assume that he is fully qualified.

By MR. WAGNER:

Q. What inspection, if any, did you make of the other flywheel, and when?

A. My inspection of the large flywheel was confined to the rough casting only, at the time when I accepted the welded casting of the smaller wheel.

THE COURT: While you are on that subject, won't you tell me first—what you said as to the cracking from contraction and shrinkage is clear enough—but what is meant by “sand cracks” and “moulding cracks.” In the first place, is there such an expression in the trade?

THE WITNESS: “Sand cracks,” I never heard of them.

THE COURT: All right.

THE WITNESS: I think that cracks which are really checks from shrinkage in the moulds are misnamed. Often, they become filled with sand, in taking out of—being taken out of the mould, and possibly in that way they get their name.

THE COURT: The cracking is really the effect of heating?

THE WITNESS: Heating and cooling,

By MR. WAGNER:

Q. Would those cracks, after they were repaired, have any effect upon the efficiency of the wheel for the purpose for which it was to be used?

A. No.

Q. Would it be possible to make wheels, in accordance with these blue prints, which would not have shown such cracks?

A. No; and such was the understanding at the time of taking the contract.

MR. WADE: That is objected to. I move that the latter part of the answer be stricken out.

THE COURT: Strike out all after "no."

By MR. WAGNER:

Q. Now, going back to the inspection which you have made——

THE COURT: One minute. Of course, I do not want this record to mislead—to be misleading in any manner. There is nothing in the written contract about it?

MR. WAGNER: About what?

THE COURT: About the presence of cracks.

MR. WAGNER: Nothing about the presence of cracks, one way or the other.

MR. WADE: No.

THE COURT: I will permit you to show whether the cracks are or are not avoidable under these conditions, and then to show whether or not they are considered as a defect.

MR. WADE: A copy of the letter that we wanted before, is here.

THE COURT: Is there anything in it that would be helpful to us now, at this point?

MR. WADE: No; it is just the proposal of 11½ cents per pound.

THE COURT: Then, let the stenographer have it, for insertion in the record.

(The letter last above referred to, in the transcription of the testimony by the stenographer, was inserted—was copied in the record, at the point therein at which it was originally offered, and marked "Plaintiff's Exhibit F.")

By MR. WAGNER:

Q. You stated that on or about April 22d, you inspected the larger and second flywheel?

A. Yes.

Q. What did you find upon that inspection, or what did you do as the result of that inspection?

A. I don't remember what I did, but I recollect that there were some cracks apparent in that wheel, too; and my recollection is that I communicated that information to Colonel Roosevelt, with the suggestion that it be handled the same as the first wheel was.

Q. To whom was that recommendation communicated?

A. To Colonel Roosevelt.

Q. About what time did you leave the service?

A. In May, of 1919.

Q. Neither of these wheels were delivered to Quantico up to the time you left the service?

A. No.

By THE COURT:

Q. Where did you see them?

A. At the De La Vergne Machine Company's shops, in New York.

#### RE-CROSS-EXAMINATION.

By MR. WADE:

Q. Your first examination of the smaller wheel was sometime in September, was it?

A. I think I stated when that was.

Q. I have it down as September 9th; I am not sure whether that is right or not?

A. I am not sure either until I see the orders. Your question was as to the——

Q. The first small wheel—when you made your first examination of the first small wheel.

A. That was in September, I examined the patterns of the wheel.

Q. You went to Reading to examine the patterns in Reading, at the foundry?

A. Yes.

Q. That was in September?

A. Yes.

Q. After that you examined the wheel, after it had been cast?

A. Yes.

Q. Can you give us that date?

A. That was sometime shortly after the 7th of February.

Q. Somewhere around February 9th?

A. Yes.

Q. Where was that wheel when you examined it?

A. At the——

Q. De Le Vergne Machine Company's?

A. De Le Vergne Machine Company's shops.

Q. Was it in its rough state?

A. No, they had made a rough turning, as it is called, of the wheel, first.

Q. After these wheels are cast, they must go through a process called "machining"?

A. Yes.

Q. Very often in the machining these sand cracks or shrinkage cracks, as they call them, turn up?

A. Yes.

Q. And very often they turn up for the first time when the wheels are machined; isn't that right?

A. Very often they are visible for the first time.

Q. In the machining of the wheel?

A. Yes.

Q. Therefore, when you made your examination on or about February 9th, the wheels had not been machined?

A. Yes, rough machined.

Q. Would not the rough machining turn up all of the cracks?

A. All that would be any detriment; yes, sir.

Q. Then any, in the final machining, that were turned up, would be immaterial, is that right?

A. Yes. Most of those turned up, even in the rough machining, were immaterial.

Q. Were any of them material?

A. I thought that in order to be on the safe side, with the Government installation down at Quantico, that we had better not take—better not leave anything undone to make absolutely certain that all cracks which might be questioned would still show.

Q. After your first examination, did you make a written report?

A. That is what I am not able to recollect, but I think I did.

Q. You kept no copy of the written report?

A. No. They were in my files in Quantico.

Q. Did you make any notes at the time when you made your original investigation or inspection?

A. Oh, personal notes; that is all.

Q. Have you any copies of those here?

A. No.

Q. Do you have clear in your mind, Mr. Dechant, just what you found—just where the cracks were—just what cracks you found, and where?

A. Well, I have clearly in my mind that there were some cracks.

Q. Can't you locate them?

A. No.

Q. Do you know whether or not there were any cracks in what would be known as the hub of the wheel; were there any sand cracks or shrinkage cracks in the hub part of the wheel?

A. I think I stated there was.

Q. What do you now say?

A. Yes.

Q. We are talking about the first wheel, the little one?

A. Yes.

Q. How many cracks were in the hub of the wheel?

A. I don't know.

Q. Can you give us an idea of how large the cracks were?

A. No.

Q. Do you know whether or not the crack extended clearly through the hub?

A. No.

Q. Did you see this wheel after it had its last machining?

A. No.

Q. Its finishing touches, as it were?

A. No, sir.

Q. After it had its rough machining the crack in the hub turned up?

A. You say "yes."

Q. I say "yes."

A. I say I saw the crack in the hub after this rough machining—after its rough machining.

Q. Then, you saw it, too?

A. Yes.

Q. Then, we agree upon that?

A. Yes.

Q. Do you have in mind now, the extent of that crack?

A. No.

Q. Do you have in mind whether or not that crack was a detriment to the wheel?

A. It was not.

Q. Is that the only crack you found in the hub?

A. My recollection is that I only saw one crack in the hub, but I am not positive.

Q. You won't be positive of that?

A. No.

Q. And, you found some cracks where the spokes of the wheel join the rim, did you not?

A. Yes, sir.

Q. How many were there?

A. Well, that is more than I can tell, at this time. My recollection is that about two-thirds of the spokes showed a crack on each side.

Q. Two-thirds of the spokes in that wheel were cracked on each side?

A. No, I didn't say that.

Q. What did you mean to say—what did you say, then?

A. I said that two-thirds of the spokes showed a crack on each side where they join the fillet in the rim, not the spokes themselves.

Q. At the point the spokes join the wheel is where you found the cracks?

A. In the fillet.

Q. On two-thirds of them?

A. On one side or the other.

Q. Were they serious defects in the wheel?

A. I don't think so.

Q. Then, why did you order them back to Reading for welding, if you thought they were all right?

A. Because, as I said before, some of them were larger than others.

Q. You say they were all right?

A. I didn't say they were all right.



Q. At any rate, it was not such a defect as would make the wheel unsafe or unfit for the purpose intended?

A. That is right.

Q. Then, if you thought that, why did you order it back to the Reading Steel Casting Company for welding?

A. Because I thought it would be better if they were closed up.

Q. Did you send to your superior, or to someone—anybody, a request that an inspector be sent there to look over these wheels?

A. I don't know if I done that.

Q. After they came back from Reading, and had been welded?

A. Sir?

Q. I say, after they came back from Reading and had been welded?

A. I don't have any such recollection.

Q. Don't you know?

A. No.

Q. Was there an inspector left there to look them over?

A. I am told so.

Q. You don't know of your own knowledge?

A. No.

Q. The wheels were never used?

A. No.

Q. You say you accepted them?

A. The one wheel.

Q. In writing?

A. No; I cannot say I did; I made a recommendation.

Q. You made a report recommending them to be accepted?

A. Yes, sir.

Q. To whom did you make that report?

A. To Colonel Roosevelt.

Q. Was that in writing?

A. I don't know; I can't tell you now.

Q. That relates exclusively to the smaller of the two wheels?

A. Yes, sir.

Q. That report was sent in by you after they came back from Reading and were welded?

A. Yes.

Q. Do you know whether or not your report was acted upon?

A. No, I do not.

Q. Don't you know that it was turned down, and another inspector was sent on the job, and he condemned the wheels?

A. I don't know that.

Q. Did you hear that?

A. I heard that; yes.

Q. These wheels are cast in halves?

A. Yes.

Q. Have you told us all the defects you saw in the smaller wheel?

A. We have talked about the defects in the hub.

Q. And two-thirds of the spokes, didn't you?

A. In the fillets, where the spokes join the rim, and there was a defect, in addition to that, at the link.

Q. Is not that an important part of the wheel?

A. Sir?

Q. Is not that an important part of the wheel, the link where the two halves are joined together?

A. Oh, yes.

Q. That is an important part of the wheel?

A. Yes.

Q. What kind of cracks were found there?

A. The same kind.

Q. What do you mean by that?

A. Shrinkage cracks.

Q. These wheels are made of cast steel?

A. Yes.

Q. They are cast in a bed of sand?

A. Yes, in a mould of sand.

Q. Would these shrinkage cracks result from too hasty cooling of the casting?

A. They might and they might not.

Q. Might they result even if the casting was not cooled hastily?

A. Yes, sir.

Q. They might result anyhow?

A. Yes.

Q. Why?

A. Oh, for a thousand reasons.

Q. For a thousand reasons?

A. For a thousand reasons.

Q. Are all castings cracked like that?

A. All subject to it.

Q. Are all the flywheels that way?

A. Not all flywheels; we are talking of cast steel flywheels.

Q. Is it not a fact that this results from too rapid cooling?

A. It may be.

Q. And too rapid cooling is caused by taking the casting out of its mould, too soon, isn't it?

A. It might be.

Q. While it is still too warm?

A. It might be, yes. It might not have been taken out.

Q. I know it might still be there, so far as we know.

A. I mean the cooling may have occurred before it is taken out of the mould.

Q. But it might have——

A. The coat may have been removed.

Q. Then, these cracks are caused by one of three

things; either by the coat being removed, or by too hasty cooling; is that right?

A. Yes.

Q. Or by being taken out of its mould too soon?

A. Yes, and still another.

Q. What is the other?

A. Because the shrinkage hood might have been too small.

Q. Suppose these things had not occurred would these cracks have turned up?

A. They might have.

Q. What would cause them then?

A. There may have been a segregation of the metal at that point.

Q. What would cause that?

A. That is almost too detailed to tell. There are lots of reasons.

Q. Is not it unusual to find as many cracks in a wheel as you found in this small wheel?

A. No; they were anticipated.

Q. I mean this: You don't usually find so many cracks all over the wheel like you found in the small one, do you?

A. Yes, of this design.

Q. A wheel of this design?

A. Yes.

Q. Why?

A. Because it is not designed for a cast steel wheel; it is for a cast iron design.

Q. In whose judgment?

A. In our judgment.

Q. In your judgment?

A. Yes.

Q. Don't you know that the De La Vergne Machine shop has designed that for a cast steel wheel?

A. No, they did not; they designed it for cast iron. That is what they told us, they told us they would use that.

Q. Who are "they"?

A. The representative of the De La Vergne Company.

Q. Who is he?

A. I don't remember his name; but I spoke not only with him, but with their chief engineer, and he told me that they would use their cast iron design and would analyze it to see that it was satisfactory for cast steel, and use the same if it was possible; and that is what I assume they did.

Q. Well, please don't assume.

A. I say that, because they said so.

Q. You said you assume—

A. You misunderstood me. I assume they did that because they said they did.

Q. They said they were going to?

A. Yes.

Q. You don't know what they did. Then, please don't assume things and we will get along all right.

THE COURT: Well, you asked him whether or not these blue prints were designed originally for cast iron castings—cast iron wheels, and he told you "yes." You then asked him why he said that, and he has a right to tell you why.

MR. WADE: I appreciate that, your Honor, but I don't like him to assume that they did something which they didn't tell him they did do.

THE COURT: He says they told him what they were going to do, and that is why he made this statement.

THE WITNESS: That is what it amounts to, yes.

By MR. WADE:

Q. You know they declared their intention, but whether or not they did so you can't say, except to assume?

A. Yes.

Q. You knew they declared their intention, but further than that you can't go, except to assume?

A. Yes.

Q. Did you see the wheels after they came back from the Reading Casting Company, the little wheel?

A. Yes.

Q. Do you recall when it was shipped back to the Reading Steel Casting Company for welding?

A. No, I do not.

Q. How soon after you made your inspection and discovered these cracks, did you inspect it again?

A. Well, the difference between the dates of those two orders.

Q. April 22d, 23d and 24th?

A. Somewhere in there.

Q. That was after it had been welded?

A. Yes.

Q. Where did you see it at that time?

A. At the shops of the De La Vergne Machine Company.

Q. Could you tell whether or not they had fixed up these cracks in the spokes?

A. Oh, yes.

Q. How?

A. Welding them electrically.

Q. Were they visible?

A. The cracks?

Q. Yes; did they close them all up?

A. So far as I could see, yes.

Q. Did they close up the crack in the hub?

A. Yes.

Q. Welded it?

A. Yes.

Q. And the crack disappeared?

A. Yes.

Q. Do you know whether or not the wheel had been finished in its machining, afterward?

A. It had not.

Q. Do you know whether or not it is now?

A. I don't know.

Q. Or whether it was finished?

A. I don't know.

Q. You didn't see it after the finishing?

A. I was out of service then.

Q. You were only out two weeks?

A. I mean, out of active service.

Q. Now, as to the second wheel—what is the difference in the size between the two wheels?

A. About three feet, I think.

Q. What is the difference in weight?

A. I don't remember.

Q. Approximately?

A. I think one was somewhere around 30,000 pounds.

Q. The heavy one?

A. And the other one about 2400, wasn't it—2400 and 4100.

Q. Then the big one was almost twice the weight of the little one?

A. Not quite.

Q. Where did you see the big wheel?

A. At the De La Vergne shops.

Q. Is that the first you saw that?

A. Yes.

Q. You saw none of them in the Reading plant?

A. No. I saw merely the patterns at the Reading plant.

Q. Of the large wheel, too?

A. Yes.

Q. At the first visit?

A. Yes.

Q. They had both patterns made up?

A. You understand, the pattern for a wheel of that nature is not a big thing.

Q. I just asked for what information you had, and what you saw. What examination did you make of the large wheel?

A. The same as of the small wheel. I examined it as to the appearance of checks, alignment, diameter.

Q. Sir?

A. I examined it as to checks, alignment and finished diameter; diameter of the hood; dimensions of the rim, etc.

Q. Did any cracks show up in that?

A. Yes, sir.

Q. Where?

A. I say, I am not able to describe so much in detail that wheel as I am the smaller one. My recollection was they were—most of the cracks I saw in that wheel were on the point where the fillet joins the spokes to the rim.

Q. Did you find any cracks where it is linked together?

A. I can't remember.

Q. Did you make any report as to that wheel?

A. I think I made a report that we follow the same procedure—that the same procedure be followed with that as with the smaller wheel.

Q. Did you recommend its being rejected or accepted?

A. Not I.

Q. You made no recommendation in regard to the large wheel?

A. Not so far as its acceptance or rejection was concerned. I made a recommendation, though, to—

Q. To whom?

A. Colonel Roosevelt, that the same procedure, of having it welded, be followed, as with the smaller one.

Q. Why?



A. For the same reason.

Q. It was not safe without being welded?

A. Yes, it was safe, only it was my policy to have the job as good as possible. You could readily appreciate that the appearance of cracks, to a layman, in a casting are always looked upon with suspicion.

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J. TURNER MOORE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. WAGNER:

Q. Where do you live?

A. Wyomissing, a suburb of Reading, Pennsylvania.

Q. Were you connected with the Reading Steel Casting Company during the fall of 1918 and spring of 1919?

A. I was.

Q. In what capacity?

A. President and general manager.

Q. Are you the same Mr. Moore who signed that contract which has been offered in evidence?

A. I am.

Q. Were the flywheels which were made under that contract manufactured by the Reading Steel Casting Company?

A. They were.

Q. When were they shipped to the De La Vergne Machine Company?

A. On November 30, 1918.

Q. What was shipped on that date?

A. Two half flywheels, weighing 41,040 pounds.

Q. Was that on November 30th?

A. On November 30th there were two half wheels

shipped, weighing 24,890 pounds—I guess I misunderstood your question.

Q. That was the large or small wheel?

A. The small wheel.

Q. On what date was the large wheel shipped?

A. On December 27th, 1918.

Q. What was the weight of that wheel?

A. The two halves weighed 41,040 pounds.

MR. WAGNER: I call for letter of January 9th, 1919, from the Reading Casting Company to the Marine Quartermaster at Quantico.

MR. WADE: We admit you billed us.

MR. WAGNER: It is admitted by counsel for the defendant, that an invoice dated November 30th, 1918, for two half flywheels, weighing 24,890, at the price of 11½ cents per pound, amounting to \$2862.35, was sent to the United States Marine Corps at Quantico by the Reading Steel Casting Company.

It is further admitted that invoice dated December 27th, 1918, for two half flywheels, weighing 41,040 pounds, at a price of 11½ cents per pound, amounting to \$4719.50, was sent to the United States Marine Corps, at Quantico, Virginia, by the Reading Steel Casting Company.

By MR. WAGNER:

Q. This letter was sent by your company (handing letter to witness)?

A. Yes.

MR. WAGNER: I offer in evidence letter from the Reading Steel Casting Company to the United States Marine Corps, at Quantico, Virginia, dated January 9th, 1919.

(Marked "Plaintiff's Exhibit L-1.")

(Copy follows):

"READING STEEL CASTING COMPANY,  
Reading, Pa., January 9, 1919.

#29

U. S. Marine Corp,  
Quantico, Va.

*Subject: Inv. Nov. 30—\$2962.35—Your Order  
#39233.*

Gentlemen:

Referring to your account, we find an invoice of November 30th in the amount of \$2862.35 still open on our books. If there is any question on same kindly advise promptly. This is quite a large sum of money to be tied up in this manner, and we would therefore appreciate receiving your check or prompt advices.

Thanking you for your prompt attention, we are,

Yours very truly,

READING STEEL CASTING COMPANY,  
D. R. Bomberger,  
*Assistant Treasurer.*

Lead-pencil notation: Geist, do you think we can pay for this wheel when the De La Vergne Machine Co. acknowledges receipt of it. W."

By MR. WAGNER:

Q. I now hand you a letter dated January 29th, 1919, and ask you if that was written by your company?

A. Yes, sir.

MR. WAGNER: I offer in evidence letter from the Reading Steel Casting Company to the United States Marine Corps, dated January 29th, 1919, with three endorsements.

(Marked "Plaintiff's Exhibit M.")

(Copies follow):

*J. Turner Moore*

“READING STEEL CASTING COMPANY,  
Reading, Pa., January 29, 1919.

#29.

U. S. Marine Corp.

Quantico, Va.

*Subject: Unpaid Invoices.*

Gentlemen:

Under date of January 9th we wrote in reference to an invoice of November 30th—\$2862.35 which is now considerably past due. Invoice of December 27th is also 30 days old, and therefore due.

As these items amount to quite a large sum of money, we must ask that you send your check promptly for same, as we cannot afford to have our money tied up in this manner.

Awaiting your prompt remittance, we are,  
Yours very truly,

READING STEEL CASTING COMPANY,  
D. R. Bomberger, *Asst. Treas.*

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Indorsement: Office of the Post Commander, Marine Barracks, Quantico, Va. Received: Forwarded: Jan. 3, 1919. Post Quartermaster.

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Feb. 3, 1919. 2nd endorsement: Marine Barracks, Quantico, Va. Office of Post Quartermaster.

From: Post Quartermaster. To: Public Works Officer. For comment and return. C. D. Sniffin by Direction.

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1121                      3rd Endorsement.                      Feb. 4, 1919.  
Office of the Public Works Officer, Marine Barracks, Quantico, Va.

From: The Public Works Officer.

To: The Post Quartermaster.

Subject: Unpaid invoice.

1. This office is of the opinion that the invoice of the Reading Steel Casting Company of Nov. 30, 1918, in the sum of \$2862.35 should be paid at once. This amount of money is less than half the entire bill for the fly wheels built by the above company and shipped to the De La Vergne Machine Company.

2. Both of the fly-wheels have been cast and shipped from the plant of the Reading Steel Casting Company to the De La Vergne Machine Company, and this office understands that the patterns are being shipped to the Quartermaster at this Post, so that the Reading Steel Casting Company apparently has fulfilled its contract. There is no need, therefore, for withholding moneys due them.

F. H. DECHANT.

Pencil notations: Hold up until Lieut. Dechant returns from New York. Payment held up as result of report of Lieut. Dechant after inspection on Sept. 8th. File with contract."

By MR. WAGNER:

Q. I now hand you letter dated February 4th, also letter dated February 10th, 1919, and ask whether they were written by your company?

A. Yes.

MR. WAGNER: I now offer in evidence letter from the Reading Steel Casting Company to the U. S. Marine Corps, Quantico, Va., dated February 4th, and letter from the Reading Steel Company, dated February 10th, 1919, to the U. S. Marine Corps, at Quantico, Va.

(Marked "Plaintiff's Exhibits N and O," respectively.)

(Copies follow):

*J. Turner Moore*

“READING STEEL CASTING COMPANY,  
Reading, Pa., February 4, 1919.

#29.  
U. S. Marine Corps,  
Quantico, Va.  
Gentlemen:

We enclose herewith statement of your account, showing \$7581.95 still due us. We find we wrote you under date of January 29th in reference to this account, and we must ask that you kindly send us your check promptly, or advise reason for withholding payment.

The terms on which we enter our customers' orders are 30 days, and we therefore expect to receive payment for same in accordance with our terms. We shall therefore await a prompt remittance, and if there are any questions, your prompt advices.

Please give this matter your immediate attention.

Yours very truly,

READING STEEL CASTING COMPANY,  
D. R. Bomberger,  
*Assistant Treasurer.*

1st endorsement: Office of the Post Commander Marine Barracks, Quantico, Va. Received Feb. 6, 1919. Forwarded: Post Quartermaster.”

“READING STEEL CASTING COMPANY,  
Reading, Pa., February 10, 1919.

#29.  
U. S. Marine Corps,  
Quantico, Va.  
Gentlemen:

Under date of February 4th we mailed you statement of your account listing items of No-

vember 30th, amount \$2862.35 and December 27th, \$4719.60.

We have written quite a number of times in reference to these items, and as both these invoices are past due we are awaiting your prompt remittance covering same.

Please give this matter your prompt attention, and awaiting an early remittance, we are,

Yours very truly,

READING STEEL CASTING COMPANY,

D. R. Bomberger,  
*Asst. Treasurer.*"

By MR. WAGNER:

Q. I now hand you letters from the Reading Steel Company, dated February 24th, 1919, April 24th, 1919, and May 5th, 1919; were they written by your company?

A. Yes.

MR. WAGNER: I offer the three letters last above mentioned in evidence, the letter of May 5th having attached thereto the second endorsement.

(Marked "Plaintiff's Exhibits P, Q and R," respectively.)

(Copies follow):

"READING STEEL CASTING COMPANY,

Reading, Pa., February 24th, 1919.

U. S. Marine Corps,  
Quantico, Va.

Attention Office of Quartermaster.

Gentlemen:

We enclose herewith copies of invoice of November 30th for \$2862.35 and December 27th amount \$4719.60. We are wondering what is holding up the payment of same, and in order to enable you to check these items we are enclosing copies of these invoices.

*J. Turner Moore*

We are in need of funds, and would be pleased to receive your check or have your advices regarding these items.

Yours very truly,

READING STEEL CASTING COMPANY,  
D. R. Bomberger,  
*Asst. Treasurer.*"

---

"READING STEEL CASTING COMPANY,  
Reading, Pa., April 24, 1919.

U. S. Marine Corps,  
Quantico, Va.

*Attention: Office of Quartermaster.*

Gentlemen:

Under date of February 24th we wrote in reference to the following: November 30—\$2862.35  
December 27—\$4719.60

and also sent you copies of same. We find these invoices are still open on our books, and as same are now considerably past due, we trust we may receive your remittance for same promptly. If there are any further questions however, would ask that you advise in reference to same.

Awaiting your attention to this matter, we are,

Yours very truly,

READING STEEL CASTING COMPANY,  
D. R. Bomberger, *Treasurer.*"

---

"READING STEEL CASTING COMPANY,  
Reading, Pa., May 5, 1919.

#29

U. S. Marine Corps,  
Quantico, Va.

*Attention: Office of Quartermaster.*

Gentlemen:

We find we wrote previously, and sent copies of invoices of November 30th, for \$2862.35, and



December 27th—\$4719.60. These items still remain unpaid, and as they are so long past due we believe you **must agree** with us we should receive your check or your reason for with-holding payment.

Our terms, as previously stated, are strictly thirty days. We pay for our bills for raw material in thirty days, and in order to do so must collect our out-standing accounts as they become due. It is therefore a great disadvantage to have invoices of November and December unpaid at this date, and we trust prompt settlement will now be made.

Thanking you for your prompt attention to this matter, we are,

Yours very truly,  
READING STEEL CASTING COMPANY,  
D. R. Bomberger, *Treasurer.*"

---

"April 25, 1919. 1st endorsement, Marine Barracks, Quantico Va. Office of Post Quartermaster.

From: Post Quartermaster.

To: Public Works Officer.

1. For comment and return. C. D. Sniffin,

By Direction.

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1806 2nd endorsement. April 30, 1919.

Office of Public Works Officer, Marine Barracks, Quantico, Va.

From: Public Works Officer.

To: Post Quartermaster.

1. Relative to the attached letter from the Reading Steel Casting Company, this office is of the opinion that 50% of the invoices of November 30 and December 27 can with entire safety be paid to the Reading Steel Casting Company inasmuch as the castings are completed with the exception of some small matters of repair which might arise

and which the Reading Steel Casting Company will surely make good. They have fulfilled their contract almost entirely and the delay is now occasioned by the De La Vergne Machine Company which is finishing the castings.

F. H. DECHANT,  
F. H. Dechant."

By MR. WAGNER:

Q. Have you a record of any replies having been received to any of these letters from the Marine Corps?

A. I find one letter, on May 5th.

Q. Did you receive that letter?

A. Yes.

MR. WAGNER: I beg to offer in evidence letter dated May 5th, 1919, from Captain C. D. Sniffin, Assistant Post Quartermaster, at Quantico, Virginia.

(Marked "Plaintiff's Exhibit S.")

(Copy follows):

"File No. 3921:5-12.

United States Marine Corps,  
Office of the Post Quartermaster,  
Marine Barracks, Quantico, Va.

Sirs:

May 5, 1919.

There is being forwarded herewith voucher covering fly wheels in the amount of \$3790.98, which you will please have signed as indicated, stating capacity of the person signing in behalf of the company, and return to this office at an early date in order that this account may be placed in course of payment.

By Direction:

Very respectfully,

C. D. SNIFFIN,

C. D. Sniffin,

*Captain, A. Q. M. U. S. M. C.*

*Assistant Post Quartermaster.*

Reading Steel Casting Co.,  
Reading, Pa."

By Mr. WAGNER:

Q. Is that in answer to any letter which you sent to the Marine Corps, at Quantico, Virginia?

A. I assume it is in answer to one of these letters asking for payment of these bills, but it does not refer to any particular letter.

MR. WADE: It speaks for itself, I think.

By Mr. WAGNER:

Q. Have you any record of any replies to the letters of the Reading Steel Casting Company of January 9th, January 29th, February 4th and February 10th, sent to the United States Marine Corps?

A. I cannot find any; I have no answers.

Q. Have you a copy of a letter from the Reading Steel Casting Company to the U. S. Marine Corps, at Quantico, dated May 14th, 1919?

A. Yes, to the United States Marine Corps.

MR. WAGNER: I call upon the defendant to produce the original of letter dated May 4th, 1919, from the Reading Steel Casting Company to the U. S. Marine Corps.

(Letter not produced.)

MR. WAGNER: I offer in evidence copy of a letter from the Reading Steel Casting Company to the U. S. Marine Corps, at Quantico, Virginia, dated May 14th, 1919, having called upon the defendant to produce the original.

(Marked "Plaintiff's Exhibit T.")

(Copy follows):

"#29.

May 14, 1919.

U. S. Marine Corps,  
Quantico, Va.

*Attention: Office of Quartermaster.*

Gentlemen:

Referring to your account, we find we have

written a number of times in reference to the following:

November 30 — \$2862.35

December 27 — 4719.60

Copies of these invoices were sent you under date of February 24th, and would therefore ask that you advise whether you have been able to identify these items and pass same for payment, or if there is any question on same. In that event, kindly advise promptly in order that we may properly adjust this matter, as these charges are so long past due we feel same should receive immediate attention.

Trusting, therefore, to hear from you promptly as to reason for withholding payment, or to receive your remittance, we are,

Yours very truly,

READING STEEL CASTING COMPANY,

B:S

*Treasurer."*

By MR. WAGNER:

Q. Did you receive a letter dated May 21st, 1919, from Capt. C. D. Sniffin, Assistant Post Quartermaster?

A. Yes.

Q. Is this it?

A. Yes.

MR. WAGNER: I offer in evidence letter from Capt. C. D. Sniffin, Assistant Post Quartermaster, to the Reading Steel Casting Company, dated May 21st, 1919.

(Marked "Plaintiff's Exhibit U.")

(Copy follows):

"File No. 776-3-15.

UNITED STATES MARINE CORPS,  
Office of the Post Quartermaster,  
Marine Barracks, Quantico, Va.

May 21, 1919.

Sirs:

Relative to your letter of the 14th instant (b:S), the Engineering Officer at this post advises that the final possible action in regard to the fly-wheels will result in the Marine Corps returning the steel wheels castings, in which event the proper adjustment of all costs incurred both as to yourselves and the De La Vergne Machine Company will be settled on that basis.

This action, inasmuch as the test of the two new power units in parallel with the cast wheels is expected to give satisfactory results, which will warrant their retention as they stand.

You may expect final word relative to above in the immediate future.

By direction:

Very respectfully,

C. D. SNIFFIN,

C. D. Sniffin,

*Captain, A. W. M., U. S. M. C.,*

*Assistant Post Quartermaster.*

Reading Steel Casting Company,  
Reading, Pennsylvania."

MR. WAGNER: I now call upon the defendant to produce letter of May 22d, 1919, from the Reading Steel Casting Company to the United States Marine Corps, at Quantico, Virginia.

(Letter not produced.)

MR. WAGNER: I now offer in evidence copy of a letter from the Reading Steel Casting Company

to the United States Marine Corps, at Quantico, Virginia, dated May 22d, 1919, the defendant having been called upon to produce the original.

(Marked "Plaintiff's Exhibit V.")

(Copy follows):

"#29.

May 22, 1919.

United States Marine Corps,  
Office of the Post Quartermaster,  
Quantico, Virginia.  
Gentlemen:

Under date of May 5th you forwarded voucher covering fly wheels in the amount of \$3790.98 to be certified, which we returned to your office in order that this account would be placed in course of payment. We have not as yet received this remittance, and trust same may be forthcoming.

Trusting to hear from you in reference to this matter, or to receive your voucher, we are,

Yours very truly,

READING STEEL CASTING COMPANY,  
*Treasurer."*

B:S

By MR. WAGNER:

Q. Is this purchase order signed by your company?

A. Yes.

MR. WAGNER: I offer in evidence purchase order and voucher referred to in letter from the Post Quartermaster, Marine Corps, Quantico, Virginia, to the Reading Steel Company, dated May 3d, 1919.

(Marked "Plaintiff's Exhibit W.")

(Copy follows):

"COMBINATION PURCHASE ORDER AND PUBLIC  
VOUCHER,

For purchases and services other than personal.  
QUARTERMASTER'S DEPARTMENT, U. S. MARINE  
CORPS.

M. B. Quantico, Va. May 3, 1919.

The United States,

To Reading Steel Casting Company,

Address: Reading, Pa.

Please furnish and deliver the following to:

.....  
All goods to be delivered on or before.....  
.....subject to the usual inspection, and are  
to be billed at the prices agreed, which include de-  
livery charges to place designated,

Respectfully,

.....  
U. S. M. C. Purchasing Officer

Account Requisition No. 740.

*Date of  
Delivery*

<i>or Serv- ice 1919.</i>	<i>Item No.</i>	<i>Quantity.</i>	<i>Article or Service</i>	<i>Amount.</i>
May 3,	1	1 only	Fly wheel, cast in halves as per con- tract dated September 4, 1918.	2862.35
			Fly wheel, cast in halves as per contract dated September 4 1918.	4719.60
				<hr/> \$7581.95
			Less 50 per cent pend- ing completion of con- tract.	3790.98
				<hr/> \$3790.98

I certify to the above order as a bill for the article delivered or service rendered, that it is correct and just and payment has not been received. \$3790.98.

Upon completion of order sign here and return to purchasing officer.

READING STEEL CASTING Co.

Ray A. Houck, *Asst. Sec.*

Where a voucher is certified in the name of a company or corporation, the name of the person writing the company or corporate name, as well as the capacity in which he signs, must appear. Example: Chicago Edison Company, per John Smith, member of firm, or Secretary or Treasurer, as the case may be.

METHOD OF OR ABSENCE OF ADVERTISING (Sec. 3709 of the Revised Statutes).

1. After advertising in newspapers. 2. After advertising by circular letters sent to..... dealers and by notices posted in public places. 3. Without advertising, under an exigency of the service which existed prior to the order and would not admit of the delay incident to advertising. 4. Without advertising, it being impracticable to secure competition because of.....

#### FORM OF AGREEMENT:

A. Under formal contract dated September 4, 1919. B. Under written proposal and acceptance filed with September. C. Under less formal agreement.....

Requisition)

Authority ) No. 740, authorizing this expenditure, is filed with voucher #1351, 3rd Quarter, 1919. . .

I certify that the above articles have been re-



ceived by me in good condition, or the services performed as stated; that they were necessary for the public service; that the prices charged are just, reasonable, and in accordance with the agreement, and that they were secured in accordance with sections. . . . and A of the methods stated above. Account submitted for \$3,790.98 differences.

Approved for . . . . . \$3,790.98

.....  
Captain A. Q. M. U. S. M. C.

Paid by check No. ....dated.....on the Treasurer of the United States, in favor of the payee named above, in amount approved above."

MR. WAGNER: I now offer in evidence copy of a letter from the Reading Steel Casting Company to the United States Marine Corps, Quantico, Virginia, dated June 9th, 1919, the defendant having been called upon to produce the original.

(Marked "Plaintiff's Exhibit X.")

(Copy follows):

"#29

June 9, 1919.

United States Marine Corps,  
Office of the Post Quartermaster,  
Quantico, Virginia.

Gentlemen:

The writer's attention has been called to the several invoices which are still open on our books as follows:

November 30 — \$2862.35

December 27 — 4719.60

Copies of these items were sent you and as same are so old we would like to have some advice as to what is now holding up payment. Under date of May 21st you stated that you would ad-

vise us in the immediate future regarding these items. We do not seem to have received this information, and as these invoices are so long past due we believe you will agree with us that they should receive prompt attention, as a large amount of money is tied up in these invoices, of which we are badly in need.

Trusting to receive your advices regarding these items, we are,

Yours very truly,

READING STEEL CASTING COMPANY,

B:S

*Treasurer."*

By MR. WAGNER:

Q. Did you see these wheels after they were manufactured, and at the time of their delivery to the railroad in Reading, Pennsylvania, for shipment to the De La Vergne Machine Company?

A. I did.

Q. What has been your experience in the manufacture of steel castings?

A. I have been in the business of making steel castings since 1899.

Q. These are copies of the blue prints which were attached to the contract of September 4th, and admitted in evidence. Is it possible, or were the flywheels which you manufactured made in accordance with the blue prints which you have in your hands?

A. They were.

Q. Were there any cracks in the flywheels which were manufactured by you?

A. Yes.

Q. State the nature of those cracks?

A. They were shrinkage cracks, due to the design of the flywheels.

Q. Would it have been possible to make these

wheels in accordance with the specifications of these blue prints without—question withdrawn.

Q. Could the flywheels have been manufactured without the appearance of the cracks which actually did appear in the wheels provided the specifications and these blue prints were followed?

A. If you mean by "specifications" dimensions, they could not be manufactured without cracks.

Q. My question is predicated upon the fact that the flywheels should be in accordance with the blue prints and dimensions and specifications of the blue prints?

A. They could not be made without cracks.

Q. Why not?

A. On account of the design.

Q. What was the feature of the design making it impossible to so manufacture these wheels that they would be free of cracks?

A. If you will examine this design, you will find there is a heavy hood and rim connected by spokes of much lighter construction, and in the cooling of this casting, or rather when the metal passes from the liquid to a solid state, there is a separation occurs between this light and heavy construction which is called shrinkage cracks.

Q. What other fact than you have just stated could account for the shrinkage cracks—withdrawn—I will withdraw that question.

Q. Did you see the flywheel which was returned to the Reading Steel Casting Company?

A. I did.

Q. Were all of the cracks in the flywheel welded before its reshipment to the De La Vergne Machine Company?

A. Yes.

Q. Do you know the date upon which that flywheel

was reshipped to the De La Vergne Machine Company?

A. March 27th.

Q. Of what year?

A. Nineteen hundred and nineteen.

Q. That was the small wheel which was returned to you for welding?

A. Yes.

Q. Did you receive from the Marine Corps, or from any department of the United States any rejection of these flywheels prior to September 1st, 1919?

A. No rejection.

Q. Or any letters with reference to the rejection of these flywheels before September 1st, 1919?

A. I do not believe so. I find a letter dated July 16th, 1919. Is that the one you refer to?

MR. WAGNER: Question withdrawn.

#### CROSS-EXAMINATION.

By MR. WADE:

Q. Mr. Moore, when did you first learn that the wheels were unsatisfactory and full of cracks?

A. They were not full of cracks, sir.

MR. WAGNER: I object to that upon the ground that the time of the rejection is not specified. There is no testimony that the wheels were full of cracks. The question says that the wheels were full of cracks.

THE COURT: You are incorporating in your question a statement of fact by yourself. You may ask him when he first noticed the condition of these castings.

MR. WADE: I asked when it was first reported to him that there were cracks in the wheels.

THE COURT: With respect to the cracks—that is, the first report to him?

MR. WADE: Yes.

THE WITNESS: I cannot tell the exact date. Between March 30th, or between November 30th when shipment was made and March 27th 1919, when it was returned. Sometime between that period. I cannot tell the exact date.

By MR. WADE:

Q. Did you not know that it was to be returned to you for welding, the small wheel?

A. Yes, before they were made, we arranged to weld the cracks which we knew would occur.

Q. Why didn't you weld them before you shipped them out?

A. Because they were not rough machined.

Q. Now, after you welded the small wheel, and sent it back, when next did you hear, if you heard at all, that it was unsatisfactory?

A. I find on July 16th—

Q. Nineteen hundred and nineteen?

A. Nineteen hundred and nineteen, an inference.

MR. WAGNER: I object to any introduction of evidence as of the date of July 16, 1919, on the ground that the testimony already shows that the wheel was returned on March 27th, 1919, and that it was impossible for the Government to reject these wheels after having delayed any notification to the plaintiff until July 16th, 1919.

(General discussion here ensued.)

MR. WAGNER: Objection withdrawn.

MR. WADE: Now, answer the question.

THE WITNESS: What is the question?

(Question read as follows):

"Now, after you welded the small wheel and sent it back, when next did you hear, if you heard at all, that it was unsatisfactory."

THE WITNESS: You want to know what time I was advised that the wheels were rejected?

THE COURT: After having been welded and sent back, or when?

MR. WADE: After——

THE COURT: What was the next time that you heard anything about a complaint as to their quality?

THE WITNESS: July 16th, 1919.

MR. WAGNER: My point is, your Honor, that after the lapse of a reasonable length of time the defendant could not reject, or object to any defects in these wheels.

THE COURT: But, you must bear in mind that this is cross-examination, and counsel ought not to—I was going to say “never”—but he should be seldom asked to develop the theory of cross-examination, because if they are to be obliged, in advance, to disclose the theory of their cross-examination, that would be almost equivalent to not having any. You must allow them certain latitude. I don’t know what the next question will be—“on July 17th, didn’t you admit that these castings were bad castings and would not be safe to use”—you can’t tell what the next question is that is in the mind of a cross-examiner. It is not safe to predict, so go ahead, and let’s have it.

By MR. WADE:

Q. You said something about “inference”; what did you mean by that?

A. I meant that in the letter of that date they referred to the fact that they were going to use cast iron flywheels, apparently, instead of steel.

Q. Did they not give you to understand that the wheels were unsatisfactory and unfit for use?

A. They said we have not satisfactorily filled the requirements of your contract.

Q. That was in July, 1919?

THE COURT: I am very much afraid that anybody who reads that in "cold" type will get the wrong impression of what the witness meant.

Will you just read that answer, Mr. Stenographer?

(Answer read.)

THE WITNESS: I will answer that question by saying that on July 16th, 1919, I received a letter from the United States Marine Corps in which Capt. C. D. Sniffin advised the Reading Steel Casting Company that they had not satisfactorily fulfilled the requirements of the contract.

By MR. WADE:

Q. Will you please read the letter?

THE COURT: We will take an adjournment at this point until Thursday morning, at 11 o'clock A. M.

(Adjourned until Thursday, November 10, 1921, at 11 o'clock A. M.)

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Philadelphia, Pa., November 10, 1921. 11 A. M.

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Trial resumed.

Present: The Court.

Appearances: As before noted.

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J. TURNER MOORE, recalled.

CROSS-EXAMINATION (Resumed).

By MR. WADE:

Q. Mr. Moore, I think when we adjourned, you had testified that you received a letter from the plaintiff about these flywheels. Do you have that letter before you now?

A. Yes, letter of July 16, 1919. I think that is the letter you refer to. I believe that is the letter you refer to.

Q. Was that the first letter you received complaining about the condition of the flywheels?

A. My recollection is that this was the first letter.

Q. That letter, then, Mr. Moore, was written after the smaller flywheel had been sent to your works and rewelded, repaired; is that right?

A. I think in March the first wheel was sent to our plant and repaired, so this letter is subsequent to that time.

Q. You have that letter?

A. Of July 16th?

Q. Yes.

A. Yes.

Q. Will you read it please?

A. (Reading.) It is dated Quantico, Virginia, July 16th, 1919, and reads as follows:

“Sirs: Referring to your communication #29 of the 9th instant, B:S, regarding payment of your invoices for \$2862.35 and \$4719.60, you are informed that as to date you have not satisfactorily fulfilled the requirements of your contract and the flywheels have not been accepted, payment cannot be made.

At present this office is awaiting quotations from the De La Vergne Machine Company for two cast iron flywheels which have been loaned us by that company and which it is desired to purchase for use here, they having been found to be satisfactory, and a statement of charges is being prepared of expense chargeable to you on account of



your failure to comply with the terms of the contract. By direction:

Very respectfully,

C. D. SNIFFIN,  
*Asst. Post Quartermaster."*

That is addressed to the Reading Steel Casting Company, Reading, Pa.

Q. That letter was dated July 16th, 1919?

A. Yes, sir.

Q. Did you reply to that letter?

A. It will be necessary for me to look through my papers. (After examining papers.) I find no carbon. I have no recollection of an answer to that.

Q. Did you receive any further advices from the Government that the wheels were rejected?

A. Yes; I find a letter dated September 3d on that question.

Q. Nineteen hundred and nineteen?

A. Nineteen hundred and nineteen, yes.

Q. May I see that, please?

A. Yes (handing letter to counsel).

Q. Will you read that letter, please?

A. (Reading.) This is on the letterhead of the United States Marine Corps, Office of the Post Quartermaster, Marine Barracks, Quantico, Virginia, and is dated September 3d, 1919. It reads as follows:

"Sirs: Referring to your contract with this office dated September 4, 1918, for two cast steel flywheels, which have been delivered by you to the De La Vergne Machine Company, New York, in accordance with the contract, you are informed that the wheels in question are hereby rejected due to defective workmanship. As these wheels are still at the plant of the De La Vergne Machine Company, who have urgent need for the space they

are occupying, shipping instructions are requested by early mail or they will be returned to you by freight collect. It is urgent that shipping instructions be given in time to be communicated to the De La Vergne Machine Company on or before the 10th inst.

In accordance with the provisions of paragraph 6 of the contract, this office is negotiating with the De La Vergne Machine Company for the purchase of two flywheels which we have been using as a loan and which have proven entirely satisfactory. This purchase will be considered as a purchase against your account in lieu of enforcing an otherwise satisfactory compliance with the terms of the contract. According to the terms of your contract, any excess in cost over your contract price would be charged to your account, but in this case there will be no excess as the amount involved is less than the wheels furnished by you would have cost.

There are, however, two outstanding invoices of the De La Vergne Machine Company which are chargeable to you, as follows:

Invoice #5885 .....	\$676.95
Invoice #9124 .....	137.25
	<hr/>
	\$814.20

These invoices cover the machining of these two rejected wheels and as the work was of no benefit to the Government, due to flaws discovered in machining, the expense involved is properly chargeable to you.

As it is necessary that this matter be closed at an early date, it is requested that you take the following action in order to effect settlement:

- (a) Furnish shipping instruction for the rejected wheels.
- (b) Settle invoices of the De La Vergne Machine Company amounting to \$814.20 by forwarding check in their favor to this office for delivery.

An early reply will be appreciated.

Very respectfully,

H. C. ROOSEVELT,  
*Lieut. Colonel, A. Q. M. USMC.*  
*Post Quartermaster.*

Reading Steel Casting Co.,  
Reading, Pa.

Copy of this communication sent to: Globe Indemnity Co., New York."

MR. WAGNER: I object to the admission of that letter unless it is followed by proof of the fact that the writer actually inspected the wheels, or by proof of the inspection of which that letter or rejection is the result.

MR. WADE: I propose to prove and offer in evidence testimony from the witness who examined these wheels and who finally made the report to the Government refusing the wheels, and on whose report and inspection this letter was based—that this letter is based on the inspection.

MR. WAGNER: The letter of September 3, 1919?

MR. WADE: Yes.

MR. WAGNER: Well, I have no objection.

By MR. WADE:

Q. That is the first advice you had that they were rejected?

A. The two letters that I read?

Q. The first letter speaks for itself, but the final letter gave you notice of their rejection?

A. Yes.

Q. You say that those are the only two letters you received in which you were advised that they were rejected?

A. Well, there are other letters in which reference to this rejection is made.

Q. But up until that time, you were looking to a plan, were you not, to remedy the defects in the wheels and make them satisfactory to the Government?

A. Well, we naturally assumed that the complaint of the Government representative would be covered; that is usually done in business.

Q. Did you see these wheels at any time in the process of moulding?

A. Why, very possibly so.

Q. Did you or did you not?

A. Well, I was in the shop practically every day. Now, I don't recall just at this minute that I saw those moulds.

Q. Have you a shop foreman?

A. Yes, sir.

Q. Is he here?

A. In this room?

Q. Yes.

A. He is not.

Q. Is he present in court to testify?

A. He is not.

Q. Have not you subpoenaed your shop foreman?

A. I cannot answer that question.

Q. Is he the same shop foreman that you had at the time when these wheels were made?

A. You mean by "shop foreman," the foreman of the department in which this mould was made?

Q. Yes.

A. No; he is not the same foreman that was there in 1918 when this mould was made. My recollection is

that a man named Besore was foreman at that time, but he is not in our employ at this time.

Q. Do you know where he is?

A. I don't know, no.

Q. How much of a plant did you have?

A. In what terms do you want me to answer that? We had at that time about 700 men on our payroll, at that time.

Q. You are engaged largely in the casting business?

A. Yes.

Q. How large is your foundry, in point of men?

A. Well, say 600.

Q. In the foundry?

A. We call the foundry the Metal Making Department, cleaning, annealing and everything of that kind.

Q. In your organization, do you have one man who is foreman of your foundry?

A. Of the moulding room?

Q. Yes.

A. Yes, sir.

Q. Do you have different departments in your foundry?

A. Yes, where small work is made—green sand work is made, and dry sand work is made.

Q. Then, you have a part where heavy castings are made, like these?

A. Yes.

Q. You have a foreman over each one of these departments?

A. Yes.

Q. Then, you had a foreman in your heavy casting department?

A. We did.

Q. That man is no longer in your employ?

A. To the best of my knowledge and belief, no.

Q. Do you know where he is?

A. I do not.

Q. You don't remember now distinctly of at any time seeing these wheels in the process of moulding?

A. I remember no particular time of inspecting these moulds, no.

Q. And your shop foreman is not here, nor anybody who was connected with the actual moulding of the wheels?

A. What do you mean by "connected"?

Q. Who did the moulding or who supervised it?

A. No, the foreman over that work is not here, no, to the best of my knowledge and belief.

Q. You don't know how they were moulded or how they were cooled, of your own knowledge?

A. Well, yes, I know how everything was moulded—moulded in accordance with our practice, certainly.

Q. How would you cool this kind of a casting?

A. How would we cool it?

Q. Yes.

A. We would not cool it at all. We would permit it to cool in the mould, in its casting.

Q. Until it is entirely cooled?

A. Until it is below the point in temperature where there would be any danger of removing it, yes.

Q. Would it be taken out of its mould when it would be so cold it could be handled with the bare hand?

A. It would necessarily have to be that cold, no.

Q. You don't know when this particular casting or these castings were taken out of the sand?

A. No, sir.

Q. Nor their condition—

THE COURT: The stage of the cooling process?

A. I know, your Honor, that these castings were permitted to stay in the mould a sufficient length of time, otherwise it would have gone into two or three pieces in our Cleaning Department.

By MR. WADE:

Q. Have you had any experience in casting steel?

A. Yes, about twenty years.

Q. In casting steel as heavy as this?

A. Oh, yes, indeed.

Q. Isn't it a fact that when you cool these, you don't cool the whole steel—the whole wheel at the same time, uniformly; you undertake to cool the heavier part first and keep the lighter parts from cooling?

A. No, you are referring to the practice followed in gray iron castings.

Q. Gray iron castings?

A. Yes, which is entirely different from the practice followed in steel casting.

Q. The practice followed in steel is the same as in cast iron?

A. It is not.

Q. What is the difference?

A. There is a lot of difference.

Q. Explain to us, Mr. Moore, how you treated this casting differently from what you would have treated it if it would have been cast iron, if you know?

A. Basing my answer to that question upon the experience I have had at the Washington Navy Yard, the iron foundry foreman will uncover a certain section of his castings to permit what you might call a uniform cooling. Now, we never do that in steel casting.

Q. You never do that in steel casting?

A. No, we don't expose a certain amount of that, because the cracks which we want to prevent in the steel occur at a time when it would be almost impossible to expose the metal; they occur when it passes from a liquid to a solid state. The cracks in gray iron castings, I understand—although I am not an expert in that—occur later than that, so that the process is different.

Q. Did you have anything to do with the welding of the small wheel?

A. I was the general manager of the plant in which it was done.

Q. I want to know, as a fact, whether or not you saw this wheel when it came back—whether or not you personally had anything to do with this welding?

A. Yes, when it came back.

Q. Did you see the welding done?

A. Did I see the fellow who did the job of welding, I did not, no.

Q. Is the man here who did it?

A. I don't believe he is.

Q. Do you have any knowledge as to how it was done?

A. What do you mean by "how," whether it was electrically done or—

Q. No, sir; whether or not the cracks were thoroughly cleaned, and whether it was done in a good, thorough, workman-like manner. Do you have any knowledge of that, from your own observation, or was the welding done merely on top of the cracks?

A. Why, this man who did this welding, named Frymyer, was our welder for years, and his work was uniformly satisfactory.

Q. I would like to know what he did in this particular case, and nothing else, if you know.

A. I can't see through a piece of steel.

Q. Did you see him do anything to the wheel?

A. No.

Q. Why didn't you say so?

A. Because if I said that it would create a wrong impression. I have confidence in the man—I am confident the welding was done right.

Q. But not from anything you saw, or anything you know?



A. Oh, yes, from things I know.

Q. In regard to what?

A. In regard to the man's ability.

Q. But, in regard to what he did on this particular wheel?

A. I know that he would do that job just as carefully as he did every other job.

Q. That is your conclusion, but not from anything you saw?

A. Oh, yes; I saw it after it was finished.

Q. But, you could not tell how thoroughly the cracks were cleaned?

A. You could not see to the bottom of them, but if they were not properly cleaned out, the chances are the cracks would have opened up again.

Q. That is just what happened with these wheels, they have opened up?

A. I don't know whether that is true or not, but if it is, they could have been re-welded.

Q. But, you did not do it—you didn't offer to re-weld them the second time?

A. I don't recall that.

Q. Was not there a proposition made whereby it was suggested that the De La Vergne Machine Company weld them on your account, and the De La Vergne Machine Company refused to have anything to do with the welding because of the unsatisfactoriness of the wheels, and they offered to you the privilege of using their shop. Isn't that a fact?

A. That may be so, but I don't recall that.

By MR. WAGNER:

Q. Have you a letter from the Reading Steel Casting Company to the office of the Post Quartermaster, Marine Barracks dated April 26th, 1919?

MR. WADE: Is this new evidence being offered?

I don't know what the purpose is. If it is new evidence, I would have to object to it, coming from this witness now.

THE COURT: What is the question?

(Question read.)

THE COURT: Do you object? He is simply asking if he has such a letter.

MR. WADE: All right.

THE WITNESS: I don't find it, Mr. Wagner, in my correspondence.

By MR. WAGNER:

Q. Has any payment been made to the Reading Steel Casting Company—

MR. WADE: We admit no payments were made.

MR. WAGNER: Will you also admit the weight of the wheels?

MR. WADE: It is admitted that the small fly-wheel weighed 24,890 pounds, and that the larger wheel weighed 41,040 pounds.

By MR. WAGNER:

Q. I understood you to say that it was impossible for you to uncover steel castings while they are cooling prior to the time in which cracks might develop, if any such cracks would develop, is that correct?

A. Well, it is dangerous, let us say, to uncover the steel casting until it has reached the temperature where it will not "fly apart" as we say in a steel foundry.

Q. At that point, are there any cracks which would develop—have they developed at that time?

A. Yes, what we call "shrinkage cracks" have developed. They develop when the metal passes from the liquid to the solid state.

Q. Now, as to the welding which was done to these wheels, what kind of welding was that?

A. Electric welding.

Q. Electric welding?

A. Yes.

Q. In the manufacture of steel castings, is it customary for the casting to be sent back to the manufacturer for welding if cracks develop?

A. In practically all cases, because the machine shop, as a rule, is neither equipped nor skilled in the welding of steel castings. There are some exceptions, however, to that rule, especially in the case of small castings.

Q. Where castings are not machined in your works?

A. Then, in almost all cases, they would be sent back.

Q. Who sends them back?

A. The machine shop who are machining the castings would send them back to us to be welded.

Q. At what time, and under what circumstances?

A. When any shrinkage cracks had been discovered, I believe.

Q. When do they discover shrinkage cracks?

A. In the machining operation, usually.

Q. Is it possible to properly weld a steel casting before it has been machined?

A. Yes, it is possible.

Q. Is it usually done?

A. If any minor cracks are discovered they are welded before the casting is shipped to the machine shop.

Q. Those cracks, then, which develop subsequently, are welded after they are returned from the machine shop?

A. Yes, sir.

MR. WAGNER: Plaintiff rests.

## DEFENDANT'S EVIDENCE.

EDGAR J. KATES, having been duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION.

By MR. WADE:

Q. Where do you live?

A. New York City.

Q. What is your business?

A. Mechanical engineer.

Q. With whom are you connected?

A. The De La Vergne Machine Company.

Q. How long have you been connected with the De La Vergne Machine Company?

A. Ten years.

Q. In what capacity?

A. For the past five years as assistant chief engineer of Power Department.

Q. Prior to that, in what capacity?

A. A subordinate capacity—in a subordinate capacity from draftsman up to that position.

Q. You were connected with them in November and December of 1918?

A. I was.

Q. In what capacity, then?

A. Assistant chief engineer of the Power Department.

Q. Do you recall the two flywheels manufactured by the Reading Steel Casting Company and shipped to your plant?

A. I do.

Q. Who prepared the plans from which they were manufactured?

A. The De La Vergne Machine Company.

Q. Were those plans originally designed for cast iron or cast steel wheels?

A. Cast steel.

Q. Then, they were originally designed for cast steel wheels?

A. Yes, sir.

Q. Did the De La Vergne Machine Company at any time manufacture any cast steel wheels from these blue prints?

A. They did.

Q. Were they satisfactory?

A. They were.

Q. Are those flywheels in operation now?

A. They are.

Q. There is nothing wrong, in your judgment, with the design of the particular flywheels?

A. No, sir.

Q. Did the De La Vergne Machine Company manufacture flywheels from both designs, the larger and smaller?

A. No, only the smaller.

Q. You remember, do you, that the Reading Steel Casting Company shipped to your plant two flywheels, for the Government?

A. I do.

Q. Do you recall about when they were shipped?

A. In the fall of 1918.

Q. Do you recall now which was shipped first, the larger or smaller wheel?

A. The smaller wheel.

Q. Mr. Turner Moore testified that the smaller one was shipped on or about November 30th, 1918; is that about right?

A. That is about right.

Q. Did you see the wheel?

A. I did.

Q. When?

A. The first time I saw the small wheel was about the middle of February.

Q. Of what year?

A. Nineteen hundred and nineteen.

Q. The wheel shipped from Reading on November 30th, 1918—that wheel would reach your plant when?

A. Probably in December, probably the latter part of December.

MR. WAGNER: If your Honor please, I object to this. Delivery was to be made f. o. b. Reading, Pennsylvania, and the testimony shows that delivery was made at that time.

THE COURT: I assume that counsel is on, not the question of delivery, but the question of the quality of what was supplied.

MR. WADE: That is it, solely. I am not raising any question of delivery, solely and exclusively on the condition of this wheel.

MR. WAGNER: Well, if it is not directed to the date of delivery to the railroad company, I have no objection.

THE COURT: Then, the objection is withdrawn?

MR. WAGNER: Withdrawn.

By MR. WADE:

Q You first saw the wheel about February 3d, 1919?

A. No, I did not see the wheel myself at that time.

Q. When did you see the wheel?

A. About the middle, the 15th, or a few days later.

Q. What was its condition when you saw it?

A. The wheel showed shrinkage cracks at a number of points on the rim, where the spokes join the rim. It also showed two cracks in the link slots, at the corners of the link slots.

Q. Tell us what you mean by "link slots"?

A. That is the point where the link bars fasten the two halves of the wheels together, and are subject to practically the entire centrifugal force of the rim of the wheel.

Q. Are the link slots an important part of the wheel?

A. Vital.

Q. The wheel is cast in halves?

A. Yes.

Q. Do you have a photograph here of the flywheels, of the ones manufactured by this plant?

A. I have.

Q. These are not pictures of the Government's fly-wheel?

A. No.

Q. These are pictures of flywheels manufactured at the De La Vergne Machine Company's shop, from plans and blue prints furnished the Reading Steel Casting Company?

A. Yes, sir. I might add to that that the castings were not made by the De La Vergne Machine Company for these wheels. They were made by other foundries.

Q. Where were they machined?

A. They were machined at the De La Vergne Machine Company's shops.

Q. Does that show where the link slots are?

A. It does.

Q. Are they in the same position on this wheel as they are on the wheel manufactured by the Reading Steel Casting Company?

A. Identically.

Q. Where are the link slots?

A. (Witness points to northwest corner of photo, to pencil-mark thereon.)

Q. Can you tell how many cracks you found?

A. Why, I cannot recall exactly now how many

cracks I saw then; but I recently made a re-examination of the wheels, and they showed some of those cracks.

Q. Mr. Kates, how many link slots did you find on these wheels?

A. There are four on each half.

Q. Were all the link slots cracked?

A. No.

Q. How many of them were?

A. Two, to my knowledge.

Q. The link slots are the place where the halves are held together?

A. Yes, sir.

Q. And you say those spots are vital?

A. Yes.

Q. Had the small wheel been machined when you made your examination and discovered cracks—cracks you testified to?

A. The small wheel was partly machined.

Q. What did you do when you discovered those cracks?

A. We notified the Government at Quantico, and requested that an inspector be sent before we proceeded.

Q. Up until that time had there been any inspection whatever by the Government?

A. No inspection was made until we requested the Government to send an inspector.

Q. The inspection of these wheels, in castings of this kind, are not made, as a rule, until after being machined?

A. Yes.

Q. Was it your practice then to notify the Government when the wheel was machined to come up and inspect it?

A. We might never notify them at all if the wheel



had not shown defects which we thought warranted special inspection.

Q. You mean, you would have inspected if for the Government, and passed on it for the Government?

A. Yes.

Q. Was that the arrangement you had?

A. We did not have any definite arrangement about it at all, but that is our practice.

MR. WAGNER: I object to the statement that they had authority, unless it is shown, your Honor.

THE COURT: I do not understand that this witness is doing anything more than describing the flywheels.

By MR. WADE:

Q. Was an inspection then made after you reported the defects and asked for an inspection?

A. Yes, sir.

Q. Who came on the job to make the inspection?

A. The first inspector was Lieutenant Dechant. He arrived about February 8th.

Q. Of 1919?

A. Yes, sir.

Q. What did Lieutenant Dechant do when he got there?

A. He went over the wheel—understand, I was not present at that inspection.

Q. He went over the wheel?

A. Yes.

THE COURT: He said he was not present. How could he say.

By MR. WADE:

Q. He came there to make the inspection?

A. Yes.

Q. And he came pursuant to a report you had sent in?

A. Which my assistant had sent in.

Q. What happened next, after Lieutenant Dechant went away?

A. We received a letter from the Marine Corps requesting us to hold up work on the small wheel pending further orders.

Q. And did you hold up work on it, then?

A. We did.

Q. Did you get any further orders?

A. On February 19th, we received a letter—we received a letter dated February 19th from the Marine Corps instructing us to return the small wheel to the Reading Steel Casting Company.

Q. And was that done?

A. That was done.

Q. When did the wheel come back, if it came back at all?

A. The wheel came back the latter part of March, I believe.

Q. Of 1919?

A. Nineteen hundred and nineteen.

Q. I think Mr. Turner testified—I mean, Mr. Turner Moore testified that the wheel was returned about March 27th, 1919. You heard his testimony, did you not?

A. Yes.

Q. Was that about the time it was returned?

A. Well, that is substantially correct; yes, sir.

Q. Now, what happened to the wheel after it came back?

A. We reinspected it, and found that the link slots had not been welded, or at least two of them were still unwelded. We wrote to Quantico to that effect, and requested that an inspector be sent again before we proceeded with the machining.

Q. And was an inspector sent again?

A. Yes.

Q. Who came?

A. Lieutenant Dechant.

Q. Do you recall when he came?

A. About April 20th.

Q. Did you have any talk with Lieutenant Dechant, or do you know what he did?

A. He inspected the wheel and said he would take the matter up with the Reading Steel Casting Company.

Q. Were you present when he inspected the wheel?

A. Yes.

Q. What did you point out to him, if anything on the wheel?

A. Well, the cracks at the link slots particularly.

Q. The cracks at the link slots particularly?

A. Yes.

Q. Any other cracks?

A. Why, the other cracks had been welded; the cracks in the rim, had already been welded.

Q. How about the cracks in the hub?

A. I cannot recall them at this time.

Q. Can you tell us, now, whether or not the welding of the cracks on the rim was satisfactory?

A. It is impossible to say.

Q. I mean, did Lieutenant Dechant make any remark at that time about it?

A. I cannot recall what he said, sir.

Q. What happened after that?

A. We received a letter dated May 1st from the Marine Corps at Quantico, saying that the Reading Steel Casting Company wished us, the De La Vergne Machine Company, to have the cracks in this small wheel welded in New York, provided the cost would be less than the freight to their plant from our plant, and back again.

Q. Then what happened?

A. A few days later, about the 6th of May, 1919, Mr. Dechant came again, along with a welding expert, and went over the wheel again, but I am not familiar with what their conference covered.

Q. Did you have any talk with him at that time?

A. I do not recall it. On May 8th, we wrote—that is, the De La Vergne Machine Company wrote the Marine Corps at Quantico, declining to undertake the responsibility of welding the cracks in this wheel, but offered the plant facilities of the De La Vergne Machine Company to the Reading Steel Casting Company, if they would send a welder to do the work at our plant.

Q. Did anything come out of that?

A. We did not hear any more about it.

Q. And during all this time, was the little wheel at your plant?

A. Yes.

Q. It was?

A. Yes.

Q. Now, what happened next?

A. We received a letter dated September 3d, from the Marine Corps at Quantico, saying that they were requesting the Reading Steel Casting Company to give us shipping instructions for the small flywheel, as they had rejected it.

Q. Then what?

A. We did not receive those shipping instructions for quite some time; but after several months' delay—I have not got the date—we received instructions to ship the wheel to the Philadelphia Navy Yard, and that was done.

Q. Were those instructions, to ship to the Philadelphia Navy Yard, given by the Reading Steel Casting Company, or by the Government?

A. By the Government.

Q. Did anybody else examine this wheel during this time except Officer Dechant?

A. Yes, sir.

Q. Who?

A. Commander Smeallie.

Q. Were you present when Commander Smeallie made his examination?

A. I was not present with him, when he made it.

Q. Did you at any time point out to him anything on the wheel or in regard to the wheel?

A. I believe that I told him the nature of the defects before he inspected them.

Q. Do you know whether or not you and he went to the wheel and saw the wheel together?

A. I don't think so, not at that time

Q. Not at that time?

A. No.

Q. Did you at any time, in the works of the De La Vergne Machine Company—

A. Inspect the wheel together?

Q. Yes.

A. Not that I can recall.

Q. Now, that closes the small wheel?

A. That closes the small wheel.

Q. What about the larger wheel?

A. We proceeded with the machining of the larger wheel quite some time later, and in October, 1919, we discovered the cracks.

Q. Where?

A. We bored the hub, and faced off one side of the hub. We did not do anything on the rim. We discovered two cracks in one-half of the hub, and a crack in the other half which extended the entire length of the part—running up alongside the face of the hub; also there were a number of smaller cracks which showed up in the bore.

We wrote the Marine Corps at Quantico, stating that in our opinion the wheel was not safe, and requested an inspection, saying we would hold up further work until the inspector arrived.

Q. And did the inspector arrive?

A. Yes.

Q. Who was that?

A. Commander Smeallie.

Q. Do you know whether or not Commander Smeallie made an inspection?

A. He made an inspection about the 23d of October.

Q. Were you with him?

A. Not at that time.

Q. Were you with him at any time when he inspected the wheel at the plant?

A. No.

Q. What happened next?

A. Then we received a letter dated November 4th, from the Marine Corps at Quantico, stating that the large wheel had been rejected, and that they would so inform the Reading Steel Casting Company.

Q. Where is the larger flywheel now?

A. At the Philadelphia Navy Yard.

Q. You saw the smaller flywheel, and the larger flywheel?

A. Yes.

Q. And you described, in detail, the defects?

A. Yes.

Q. Were these flywheels fit for use, or safe to use when you saw them in the condition you have described?

A. They were not.

Q. Were they safe to use or fit to use after the small flywheel had been welded?

A. They were not.

Q. Can you tell us, Mr. Kates, what caused those

cracks, cooling cracks or shrinkage cracks, as they have been called in these cast steel flywheels?

A. The most probable reason was improper handling in the foundry.

Q. Foundry defects?

A. Yes, foundry defects.

Q. Is that what they are known as in the trade?

A. Yes.

Q. What do you mean by "improper handling in the foundry"?

A. Improper cooling of the wheel——

Q. Yes?

A. Improper headers——

Q. What you mean by "improper headers"?

A. They are the channels through which the molten steel flows to the casting.

Q. That would cause these cracks?

A. Yes; those would be the most important.

Q. They are generally known, you say, as foundry defects in the trade?

A. Yes, sir.

Q. Did you see the wheels lately?

A. Yes, sir.

Q. When?

A. On Monday.

Q. Where?

A. At the Philadelphia Navy Yard.

Q. Did you make an inspection of them then?

A. I did.

Q. What is their condition today?

A. They still show some of the cracks that were reported at that time.

Q. Was the welding that was done by the Reading Steel Casting Company satisfactory—did it remedy those defects, cracks at the rim?

A. There is no way of telling.

Q. Why?

A. Because superficial welding would have covered over the cracks without filling them in.

Q. How do they usually weld cracks?

A. By opening them and filling them and welding them in right to the bottom—cleaning them out and welding them right to the bottom.

Q. Could you tell whether these were treated in that manner?

A. It is impossible to tell.

Q. Did any cracks show after the little wheel came back from Reading?

A. Yes, there were cracks in the link slots.

Q. Then, it was suggested that the second welding take place?

A. Yes, sir.

Q. Did they ever take place?

A. Not at the plant of the De La Vergne.

Q. Or anywhere?

A. The wheel shows cracks today.

Q. Can you tell whether or not they were welded—

A. There were no signs of welding at two different points where the cracks showed.

Q. These cracks are still clear on the face of the wheels?

A. Yes.

Q. Can you tell how large the rims of the wheels are?

A. I don't remember exactly. I can tell in a minute.

Q. The rims are about square?

A. They are a little deeper than they are wide. The large wheel has a rim section of eighteen inches deep by thirteen inches wide.

Q. How large is the rim on the small wheel?

A. The small wheel has a rim section of fifteen inches in depth by eleven inches in width.



CROSS-EXAMINATION.

By MR. WAGNER:

Q. Mr. Kates, you stated that steel flywheels have been made from the same plans which were submitted to the Reading Steel Casting Company for these wheels?

A. Yes, sir.

Q. And that those wheels were satisfactory?

A. Yes, sir.

Q. Who did the work?

A. There were three wheels. One was done by the Standard Steel Works of Burnham, Pennsylvania; the other two were cast by the Baltimore Steel, now the Pennsylvania Seaboard Steel Company of Newcastle, Delaware.

Q. Have you seen those steel flywheels?

A. Yes, sir.

Q. Where are they?

A. They are now at——

Q. Where did you see them?

A. At the plant of the De La Vergne Machine Company.

Q. Did you ever see them in the foundry?

A. No.

Q. Did you examine them closely before they went out?

A. Yes.

Q. Were there any welds?

A. No signs whatever.

Q. Did you look for welds?

A. Yes, in a general way.

Q. In a general way?

A. Yes.

Q. Did you inspect the flywheels—first, who machined these?

A. The De La Vergne Machine Company.

Q. Did you inspect them?

A. Before or after?

Q. Before.

A. No.

Q. Did you inspect them after machining?

A. Yes.

Q. Had these flywheels been sent back to the manufacturer for any welding?

A. They were not.

Q. Can you tell whether or not a steel flywheel has been welded after machining?

A. No, not if the welding is perfectly done.

Q. You did not inspect the flywheel before machining?

A. I did not, but I have the reports of inspection before machining.

Q. What other experience besides the inspection of these three flywheels that you mentioned, and the two manufactured by the Reading Steel Casting Company have you had, in the inspection of cast steel flywheels?

A. I cannot recall any other.

Q. Don't you know that it is customary in the manufacture of steel castings to give the manufacturer the right to weld if any shrinkage cracks should appear?

A. No, sir; I have reason to believe to the contrary.

Q. What is that?

A. I have reason to believe to the contrary.

Q. On what is that based?

A. Because the De La Vergne Machine Company entered into a contract to machine these wheels from the Reading Steel Casting Company and when they entered into that contract it was understood that there would be just one machining operation. I mean, there was no understanding that there would be two machining operations otherwise the De La Vergne Machine

Company would have had to increase its price for machining these wheels.

Q. Isn't it a fact that it is customary for the steel casting manufacturers to take back any wheels which may develop cracks in machining, weld them electrically and then return them to the machining company.

A. It may be a practice of steel casting manufacturers to take back wheels which happen to show cracks and weld them at their own expense, but I do not know that they expect these cracks regularly and make a practice of welding them.

Q. But there is no reason why they should not be welded after they appear?

A. If the cracks are minor, there is no harm in welding them.

Q. If the cracks that appeared in these wheels—in these flywheels were properly welded, the wheels would have been satisfactory, would they not?

A. If the cracks were minor; but if the cracks were serious, no welding could be considered safe.

Q. Were there any serious cracks in the flywheels?

A. Why, the link slots, I would consider them very serious, in the link slots.

Q. What experience have you had in the inspection of cast steel flywheels?

A. I have charge of the entire final inspection at the De La Vergne Machine Company.

Q. But you say that the only cast steel flywheels that passed through your plant were these two and the other three concerning which you testified?

A. Those are the only steel ones.

Q. Those are the only steel ones?

A. Yes, sir.

Q. Therefore, your experience is limited to those five wheels?

A. Outside of my general knowledge as an engineer.

Q. How deep are those cracks in the link slots?

A. You have the sketches. There is a crack of one and a quarter inches long at one slot.

Q. How deep?

A. I want to explain, that the examination we made on Monday was an examination of these wheels after they had been lying in storage for quite a few months, and the wheels have rusted up a good deal. Therefore, the cracks are not nearly as easily found as they were immediately after machining. The sketch which I have in front of me, was made last Monday.

Q. Therefore, you did not find out the depth—you did not find out how deep the crack was?

A. Oh, yes; but I cannot recall the exact dimensions, now, as to how long these cracks were at the time I first inspected them.

I went to the Philadelphia Navy Yard on Monday to look them over again and to refresh my memory. The cracks are now visible to the extent of one and one quarter inches long at one link slot, and about a quarter of an inch long at another.

Q. How deep?

A. I cannot tell; they are not straight, so that I could not follow them to the bottom.

Q. If you do not know how deep they are, how do you know the degree to which they would affect the wheels?

A. A crack an inch and a quarter long at that section which takes the heavy shearing stress, all along the bottom, it is serious.

Q. In which direction does the crack extend?

A. In a diagonal direction, toward the inside of the rim.

Q. In other words, the crack itself is practically a part of the radius of the wheel?

A. No.

Q. Diagonal to the radius of the wheel?

A. No, it extends not quite radially; it is not radial, no.

Q. Is that the sketch you have of the crack, (pointing to sketch in witness's hand)? What is the area of the rim of the flywheel?

A. At that point I would have to calculate that from the blue print. At that point, the normal section is cut away for the link bars.

Q. What is the normal section?

A. I think I said 11 by 15; the smaller wheel 11 by 15, is the normal section.

Q. That is 165 square inches?

A. Yes.

Q. What is the area of the link bar——

A. Five and a half by three and a quarter.

Q. Five and a half by three and a quarter?

A. Yes.

Q. What is the area of the link-way?

A. Five and a half by three and a quarter.

Q. Five and a half by three and a quarter?

A. Yes.

Q. What is the total area of the link bar?

A. About 16 or 17——

Q. Square inches?

A. Yes; but there are two link-ways on each half.

Q. That would be, therefore, the area of the link bars at that point would be about 32 square inches; is that correct?

A. Yes.

Q. Therefore, the area of the link bars, or the part which is taken out is only one-fifth of the total area of the wheel?

A. That is correct.

Q. Does the inch and a quarter crack of the material affect the strength of the wheel at that point?

A. Yes, indeed, because an inch and a quarter crack could expand very easily under the influence of that heavy stress at that point.

Q. You say that could not properly be welded and used?

A. I would not consider it safe to weld it and use it.

Q. Suppose that piece cracked all the way through, and a piece of it came off, would not the link slot hold the wheel together—the link will stay in place?

A. No, it would only hold a very small section of the wheel; the rest of the rim would be free, practically, except the other half which would be liable to break on account of the unbalanced stress.

Q. I understand cast iron wheels are being used in connection with engines you furnished, at Quantico?

A. Yes.

Q. What is the rim tension of the cast iron fly-wheels now used at Quantico?

A. I would have to figure it out, but it is equivalent to a rim speed of about 5000 feet per minute.

Q. What is the rim tension of these wheels as you designed them?

A. It is equivalent to a rim speed of approximately 8000 feet per minute.

Q. What is the unit stress in the middle of this rim?

A. If it was designed——

Q. Yes, to that speed?

A. I haven't got the figures of the design here.

Q. Did you design these?

A. No.

Q. You did not design them?

A. I did not.

Q. Don't you know that that rim stress is about 3000 pounds per square inch?

A. I do not, no.

Q. You have seen the cast iron flywheels now in use at Quantico?

A. Yes.

Q. Are those of exactly the same pattern as the patterns which were used for the manufacture of these flywheels?

A. No, sir.

Q. Are they practically the same patterns, same type?

A. Make your question more definite, please.

Q. Are they the same type—they have the heavy rim?

A. Yes.

Q. And slight spoke?

A. I would not call that a slight spoke.

Q. They have a heavy hub?

A. Yes.

Q. The spoke is connected with the rim in exactly the same way as the drawings for the cast steel fly-wheel is connected?

A. It is cast like all flywheels of that kind.

Q. The shape and connection is the same?

A. By a fillet; that is correct.

Q. You said that in May sometime you wrote a letter to the Reading Steel Casting Company with reference to the welding of two cracks in the link slots?

A. That the De La Vergne Machine Company wrote to the Reading Company?

Q. Yes.

A. I don't think I said that.

Q. You wrote no letter at all?

A. Direct to the Reading Steel?

Q. Direct to the Reading Steel.

A. Not to my knowledge.

Q. Everything went through Quantico. You had no communication directly with the Reading Steel Company?

A. Not to my knowledge.

Q. When was the large flywheel machined?

A. It had been partly machined by the 9th of October, 1920.

Q. October 9th, 1920?

A. Yes, sir.

Q. From whom did you receive orders for the machining of this wheel, or did you receive orders?

A. We had a contract with the Government, at Quantico.

Q. To machine these flywheels?

A. To machine these flywheels.

Q. Did you machine them upon order from the Government or upon arrival, as the flywheels came into your shop?

A. We don't wait for any further instructions; we didn't wait for any further instructions.

Q. You stated that the second flywheel, in its present condition, is not safe for use—for the use for which it was intended?

A. No.

Q. Why not?

A. Because it showed cracks in the hub which seemed to be quite extensive.

Q. Are those cracks welded?

A. I cannot tell whether they have been or not.

Q. Did I say "large flywheels"?

A. Yes.

Q. I beg pardon, small flywheels. You stated that the small flywheel was not safe for use in its present condition?

A. Yes.

Q. Why not?



A. Because it has cracks at the link slots.

Q. Is that all?

A. It also shows signs of welding at another link slot, and quite unsafe welding.

Q. If these welds were properly done, the wheels would be satisfactory?

A. I don't think so.

Q. That is your opinion, in view of your examination of this cast iron wheel? In your view of the examination of these cast steel wheels, I should say?

A. If the De La Vergne Machine Company were turning out such wheels for a customer, and it was up to me to pass upon them, I would reject them.

Q. You would reject them, as cast iron wheels?

A. As cast steel wheels, knowing what I do in general about steel castings, and the experience with the other three and the other steel flywheels I have seen.

Q. Your principal work is with cast iron flywheels?

A. Yes.

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COMMANDER JOHN MORRIS SMEALLIE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. WADE:

Q. What is your rank, Commander?

A. Commander, United States Navy.

Q. How long have you been in the service?

A. I graduated from the Naval Academy in 1905.

Q. And you have been in the service since that time?

A. Yes.

Q. Did you, I think on Monday of this week, with Mr. Kates, go to the Navy Yard and examine two certain flywheels?

A. I did.

Q. Directing your attention to the small flywheel, steel fly wheel, will you describe what you found?

A. There was only one sketch made at the time. There was only one lead pencil between us, so only one sketch was made for both.

Q. Is that the pencil sketch that was made at the time, (pointing to sketch)?

A. Yes, made at the time.

Q. Will you tell what you found on the smaller wheel?

A. The wheel had a coating of light rust over all the parts, both the machined and the rough. It had been lying in storag for perhaps a year. We rubbed it off as best we could.

On the small flywheel we were able to detect the parts that had been welded. These were shown at the end of each spoke, with the exception of one side of one.

Q. Were all the other spokes welded between?

A. Yes, and one side of that was welded; these are the full spokes; on the half spokes, which end up with the link slots, the welding there is sort of combined with the link slot welding; that is, the link slot ends up near the end of the spoke; on that there was one welded on one end, and one welded on the opposite end.

Q. Is that all you found on the smaller wheel?

A. There was also a weld in the bore, but that we have not made a sketch of. On the end, the hub face, there was one shown there.

Q. Is that what we have been calling the "hub"?

A. That is on the end of the hub.

Q. Describe the crack you found on the hub?

A. There was a crack at the corner of the link slot, on what we marked "upper half front," about an

inch and a quarter long, starting from the sharp corner in the link slot.

Q. Is that all you found on the smaller wheel?

A. On the other half of the wheel also there is or there was just the beginning of a crack; it could have been an eighth or a quarter of an inch long.

Q. What part was this on the wheel?

A. In the same place, at the link slot.

Q. Have you given us all the cracks found in the small wheel?

A. Yes.

Q. Can you tell whether or not that wheel is safe for use in this condition—

A. It is the same condition when I reported it in 1919 as being unsafe.

Q. You are the Commander who ordered its rejection—

A. Recommended its rejection.

Q. You say it is now in the same condition it was then?

A. Yes.

Q. Now, passing on to the larger wheel, tell what you found on Monday of this week when you examined it?

A. This also had a heavy rust coat. We had to brush it off with wire brush rags and gasoline. Finally, in one place, it did not agree with my report of 1920, in that I can only trace the crack about half way across the hub base, and in 1920 I reported it as being entirely across.

Q. You say now you found it—

A. One-half of the larger flywheel—there is a crack half way across the hub base, and extending up in the front, the finished side of the hub.

Q. I suppose the crack was more visible in 1920 by reason of the more recent machining?

A. Yes, it was machined within two or three weeks, and was still bright.

Q. Are there any other cracks you found in the big wheel?

A. That is all. There are no other machined parts. I looked over the rough surfaces, but they are so rough I could not detect any starting cracks.

Q. Was that wheel at any time welded?

A. The large one?

Q. Yes.

A. I don't know. It gives no appearance of welding.

Q. Can you say whether or not it was safe for use in the condition you found it on Monday of this week?

A. I would say it was in the same condition as when I recommended its rejection in 1920.

Q. When did you come on the scene in connection with these wheels in 1919?

A. Sometime immediately preceding my report of October 22d, 1919.

Q. Before October of 1919?

A. Sir?

Q. Before October 19th, 1919?

A. Within a day or two.

Q. When were you detailed to the De La Vergne Machine shops?

A. I was on duty as inspector at the De La Vergne Machine shop. This report, in the form of an endorsement, of October 22d, was in obedience to a preceding endowment from the Bureau of Steam Engineering, under which I was working, to make this inspection of the flywheel ordered by the Marine Corps.

Q. What was your particular function—your particular duty at that time?

A. The inspecting of machines at the De La Vergne Machine shops.

Q. How long were you there?

A. Since January of 1919.

Q. Were the De La Vergne Machine works doing considerable work for the Government?

A. Yes, indeed, but not of this character.

Q. All of the work required an inspector on the job all the time?

A. Oh, yes; about half of its capacity was being utilized by the Government.

Q. What did you do when you got your orders?

A. I went out to the shop and examined the fly-wheel.

Q. Which one?

A. The small one. I examined both at that time; one was in the machine shop and the other in the storage shop.

Q. That must have been after Mr. Dechant made his examination, and after the wheel came back from Reading—

A. It had been welded, yes; but I don't know about Lieutenant Dechant; I don't remember seeing him in the machine shop.

Q. Did you make a report to the Government at that time?

A. Yes.

Q. Where is that report?

A. I have a copy of it here.

Q. May I see your copy?

A. You have the original.

Q. Is this your original report?

A. No, that is in 1920.

Q. Nineteen hundred and nineteen is the first one?  
Is this the report (handing report to witness)?

A. Yes, that is the one.

Q. That is the report with these two pages?

A. That is right.

Q. Headed by "Fourth Endorsement"?

A. Yes.

MR. WAGNER: I desire to offer this report in evidence.

(Last above-mentioned report marked "Plaintiff's Exhibit Y".)

(Copy follows):

*"4th Endorsement.*

Office of Naval Inspector of Machinery, USN.,  
De La Vergne Machine Company, Ft. E. 138th St.,  
New York, 22 October, 1919.

From: Naval Inspector of Machinery.

To: Quartermaster, Marine Corps.

Via: Bureau of Steam Engineering.

1. Returned.

2. I have examined the two fly wheels in question and find as follows:

(a) There are two steel fly wheels at this plant; one has been machined, the other has not. The smaller of the two after machining showed shrinkage cracks at junction of each spoke with the rim, on inside of hub bore and at corners of link slots (keyway where two halves are held together at rim). The wheel was returned to contractor, Reading Steel Casting Co. for remedying defects. All cracks are welded up, except what are perhaps the most important; those in link slots. There are no means of knowing how deep the other cracks were found to be, nor how well they were searched and cleaned. The Reading Company also had welded on and filled in several depressions on the faces of the rims. Unless these were excessively deep, there would be no occasion for this, especially as this now necessitates re-planing and re-turning, bringing the thickness of rim still farther below blue-print size. However, this latter is not so important a matter.

3. I recommend rejection of the smaller fly wheel for the reasons:

- (1) Cracks existing at link slots.
- (2) Remedying of serious shrinkage cracks at junction of rim and spokes by what has all the appearance of merely surface welding.
- (3) Unsuitably for service of a heavy fly wheel welded in so many places.

4. The larger fly wheel is still in the rough state as it came from the foundry. No defects can be detected at present, but inasmuch as the cracks of the smaller wheel were not discovered until surface machined, it is quite probable that this one is also defective. Until a more definite reason then probability is found, however, this casting cannot be rejected and should stand as acceptable until machining proves it otherwise.

J. M. SMEALLIE,  
*Commander, USN."*

By MR. WAGNER:

Q. Did you hear from this report?

A. No; I never heard from it again.

Q. Did you make any examination before this?

A. No, except the one on which this was based.

Q. Was there an examination before this?

A. I never made any examination except the one on which this report is based, which was within the time of inspection.

Q. That would be some time prior to October, 1919?

A. Yes.

Q. Taking these two wheels as you found them now, how could they have been made fit for use, if it had been possible to fix them up?

A. The smaller one is welded in so many places

now that it was my judgment that it was too many places for it to be safe to use.

Q. Then, the smaller one was beyond redemption?

A. Yes.

Q. What about the larger wheel?

A. The larger wheel, in my opinion, at the time, and still is, that that is a vital part of the wheel—it is out of sight when it is on the shaft, and it would have to be decided by some one above me, and over my recommendation, before I would pass it; and it would have to be proved that this crack now shown on the surface is only a surface crack.

#### CROSS-EXAMINATION.

By MR. WAGNER:

Q. Commander, what experience have you had with steel flywheels other than these two, so far as flywheels of this type of construction are concerned?

A. None.

Q. What experience have you had generally with respect to steel castings?

A. While my duties have never been at that particularly, that is in the machinery part of my education. It is simply general knowledge that I have acquired; I have been two years in the Machinery Division at the New York Navy Yard. I was Chief Engineer of two battleships, and I had this inspection at the De La Vergne shops, which had to do with no steel castings as large as these probably, but steel castings in the usual run of machinery parts, for two years.

Q. But, you have had no actual experience with the construction of steel flywheels?

A. No.

Q. And you have had no foundry experience—know nothing about the conditions under which they are made in the foundries?



A. Except just in general.

Q. You have never inspected any steel castings for flywheels such as these?

A. Never.

Q. Do you know the different points of construction between cast iron flywheels and cast steel flywheels?

A. No, I would not say that I know the difference between them except that you cannot expect to find such perfect castings in cast steel castings as you do in cast iron.

Q. Will you state between what dates your inspection of the flywheels was first made? You said, I believe, that your recommendation was made on the 22d of February, 1919?

A. Yes, sir.

Q. Can you say confidently that your inspection must have been prior to that date?

A. Within two or three days.

Q. Within two or three days?

A. Yes.

Q. At least, can you give any definite date?

A. It would be the date of the endorsement, preceding—

Q. What is the date of the endorsement preceding that?

A. It is in that evidence there (referring to papers). The third endorsement just before that, signed "Early," October 18th.

Q. Therefore, that inspection must have been made between October 18th and October 22d, 1919?

A. Yes.

Q. Was the smaller flywheel completely machined at the time of your inspection?

A. I did not go into the dimensions.

Q. Was it machined, I asked you?

A. It had been machined, but whether finally or rough machined, I don't know.

Q. But it had not been machined subsequently to the welding?

A. No.

Q. What was the date of your second inspection of the large wheel—I think that was November 4th?

A. No; the second one was between October 20th, 1920, and October 26th, 1920.

Q. Between October 20th, 1920, and October 26th, 1920?

A. Yes.

Q. Do you know whether either of your recommendations were acted upon, of your own knowledge?

A. No, I did not, until I heard of this suit.

Q. But of your own knowledge, you don't know?

A. No.

#### RE-DIRECT EXAMINATION.

By MR. WADE:

Q. The third endorsement, is that the report on the larger flywheel?

A. Yes.

MR. WADE: I offer this in evidence.

(Marked "Defendant's Exhibit").

(Copy follows):

"103-5000-JMS-FS                      October 26, 1920.

#### *3rd Endorsement.*

From: Inspector of Machinery, USN.

To: Bureau of Engineering.

1. Returned.

2. I have inspected the fly-wheel in question and find as follows:

- (a) The machining that has been done consists of boring the hub (with both halves bolted together) and facing of one end of the hub.
- (b) Two shrinkage cracks run along the bore of one half and across the machined hub face. One shrinkage crack runs along the bore of the other half.

3. These cracks are in an important strength part of the wheel and if the latter is used will be unsafe. As this wheel weighs approximately 17 tons (finished), it is not recommended that welding be tried on account of the unreliability of such repairs under hard service conditions.

4. For reasons set forth in paragraphs 2 and 3, it is recommended that this wheel be rejected and not used.

**J. M. SMEALLIE,**  
*Commander, USN."*

(Recess taken until 2 P. M.)

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Two P. M. Trial resumed.

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CAPT. CHARLES D. SNIFFIN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. WADE:

Q. Where are you located, Captain?

A. At the Marine Barracks, Quantico.

Q. How long have you been there?

A. For more than four years.

Q. Do you know whether or not these flywheels were inspected sometime before the inspection made by the witnesses preceding you?

A. There was, in addition to the inspection made by Lieutenant Dechant, an inspection by the then First Lieutenant Davis, of the Marine Corps.

Q. And later by Commander Smeallie?

A. By Commander Smeallie.

Q. Did Lieutenant Davis make a report?

A. He did.

Q. Is that report here?

A. Yes, sir.

Q. Is this the report (handing report to witness)?

A. That is the report.

MR. WAGNER: If your Honor please, I object to the admission of that report, in view of the fact—

THE COURT: It has not been offered, as yet; he is only identifying it.

By MR. WADE:

Q. Who received this report?

A. It was received by the Post Quartermaster.

Q. Is that Mr. Davis's signature there?

A. Yes.

MR. WADE: We offer this report in evidence.

MR. WAGNER: That is objected to, if your Honor please.

THE COURT: Objection sustained.

(Exception noted for the defendant, by direction of the Court.)

By MR. WADE:

Q. What is the date of the report?

A. I beg pardon?

Q. I say, what is the date of the report?

THE COURT: That is, I sustain the objection as to contents of the report, but I will admit it as evidence that he made a report.

By MR. WADE:

Q. What is the date of the report?

A. September 3d, 1919.

MR. WAGNER: I also make the objection, if your Honor please, that there is no authority shown for the making of the report. Therefore, I object to any evidence as to the fact that the report was made, in view of the fact that there was no authority shown.

THE COURT: You mean, statutory authority?

MR. WAGNER: Or any authority of any person in the Marine Corps who had authority to designate this officer as an inspecting officer.

THE COURT: He can show the fact that the man made an inspection, and made a memorandum of the result of it; that he put it in writing and offered to produce it. He is entitled to show that; otherwise he might be charged with suppressing some evidence.

By MR. WADE:

Q. What was Mr. Davis's rank at that time?

A. He was then—I am not quite sure—he was at one time a captain in the Marine Corps, and later he went back to the rank of first lieutenant. Then, later he was promoted to the rank of captain. He was either captain or first lieutenant at that time.

Q. After these reports were all made, was there any report sent to the Reading Steel Casting Company in regard to the flywheels?

A. On the same day that the report of Lieutenant or Captain Davis was made, a notice of rejection of the small flywheel was sent to the Reading Steel Casting Company.

Q. Is this the letter to the Reading Steel Casting Company (handing letter to witness)?

A. Yes; but it was subsequent to that time, to the inspection of Commander Smeallie.

Q. Was there any word sent to the Reading Steel Casting Company between the report of Lieutenant Davis and the report of Commander Smeallie?

A. There was.

Q. Have you got that?

A. That letter has been offered.

Q. It is already in evidence?

A. Yes, sir.

Q. What is the date of it?

A. September 3d, 1919.

Q. Is this the letter (handing letter to witness)?

A. That is the letter.

Q. This letter then, was sent between the date of the report of Lieutenant Davis and the report of Commander Smeallie?

A. This letter is dated the same day as the report of Lieutenant Davis.

Q. Do you know whether or not a letter was sent to the Reading Steel Casting Company rejecting the other flywheel?

A. There was.

Q. Do you recall the date of that?

A. I do not.

Q. Was it prior to or subsequent to the letter rejecting the small one?

A. Subsequent to that.

Q. Do you know whether or not the Reading Steel Casting Company made any reply to these letters?

A. No, I do no recall. There may have been a letter from their attorneys.

Q. Did you prepare a voucher and send it to the Reading Steel Casting Company, to be signed by them, covering a 50 per cent. payment for these wheels?

A. I did.

Q. At that time did you or not know whether or not there was any question about them being according to plans and specifications, and fit for use?

A. That question may have been raised, or we may have received reports to that effect at that time; but this voucher was prepared upon the recommendation of Lieutenant Dechant and the then public works officer.

Q. What was the recommendation in regard to making these wheels satisfactory, if any?

A. Well, that was not reported on at that time. The report upon which this voucher was prepared was to the effect that they having made shipment of the wheels, that he thought they were entitled to at least 50 per cent. of the contract price.

Q. Because they made shipment?

A. Because they made shipment.

Q. The voucher was returned by the Reading Steel Casting Company?

A. It was signed and returned by the Reading Steel Casting Company.

Q. But it was never paid?

A. It was never paid.

CROSS-EXAMINATION.

By MR. WAGNER:

Q. Did you not receive a letter from the Reading Steel Casting Company, dated September 26th, 1919, in reply to the letter in evidence, of September 3d, 1919?

A. I could not say without looking it up.

Q. Well, will you please look through your records and see whether or not you have such a letter?

A. (After looking through papers.) I have.

Q. Is this the letter (handing letter to witness)?

A. That is the letter.

MR. WAGNER: I offer in evidence letter from the Reading Steel Casting Company to the office of the Post Quartermaster, Quantico, dated September 26, 1919.

(Marked "Plaintiff's Exhibit Z.")

(Copy follows):

“READING STEEL CASTING COMPANY,  
Reading, Pa., September 26, 1919.  
Captain C. D. Sniffin,  
Q. M., U. S. M. C.,  
Office of the Post Quartermaster,  
Marine Barracks, Quantico, Va.  
Dear Sir:

I am in receipt of your letter of the 22nd instant as well as the letter of September 3rd, over the signature of Lieut. Colonel H. P. Roosevelt, in connection with the Fly Wheel Castings made by this Company and shipped to the De La Vergne Machine Company.

It is hardly necessary for me to comment on that part of the letter of September 3rd, referring to charges on account of machine work, as you know very well that, regardless of whether these castings were defective or not, no such account could be collected.

In connection with the castings you wish to condemn and return to us; in August 1918 Lieut. Dechant came here and requested that we make these castings for you. We invited the attention of Lieut. Dechant to the fact that work of this kind was not desirable in view of the fact that it was usually inspected by officers not familiar with steel castings, and therefore, the material was liable to be condemned when satisfactory for the purpose intended. Lieut. Dechant placed this order with us on the positive assurance that he would



personally inspect the castings, and that his acceptance or rejection would be final.

We invited Lieut. Dechant's attention to the fact that perfect castings could not be made of the design as shown, but castings satisfactory for the purpose intended could be produced.

The castings were made, inspected and finally passed by Lieut. Dechant. The small defects which you refer to do not in any way interfere with the service ability of these castings. They are entirely satisfactory for the purpose intended, and it is the purpose of the Reading Steel Casting Company to see that these Fly Wheels are accepted and paid for.

Before placing the matter in the hands of our attorney for collection we will wait until October 10th for further comments from your office.

Yours very truly,

JTM:CH.

J. TURNER MOORE, *President.*"

By MR. WAGNER:

Q. You stated that the voucher which was sent to the Reading Steel Casting Company was sent because of certain representations made by Lieutenant Dechant; were they made to you?

A. No, to the Post Quartermaster at Quantico.

Q. Not to you?

A. Not directly.

Q. Therefore you don't know what they were?

A. Yes.

Q. How do you know?

A. Because I had charge of that particular work.

Q. Who told you what they were?

A. How is that?

Q. I say, you say that the representations or the statements were made to the Post Quartermaster?

A. Yes. I was assistant to the Post Quartermaster, in charge of all such matters.

Q. Were those recommendations made in writing?

A. In writing.

Q. Have you the writings here?

A. I will see.

Q. Will you look among your papers and see if you have them?

A. (After examining through papers.) I cannot find that letter, but I remember having seen it in the correspondence.

MR. WADE: I offer in evidence these letters of July 16th and September 3d.

(Marked "Defendant's Exhibits .")  
(Copies follow):

"UNITED STATES MARINE CORPS,  
Office of the Post Quartermaster,  
Marine Barracks, Quantico, Va.,

July 16, 1919.

Sirs:

Referring to your communication #29 of the 9th instant, B:S, regarding payment of your invoices for \$2862.35 and \$4719.60, you are informed that as to date you have not satisfactorily fulfilled the requirements of your contract and the fly wheels have not been accepted, payment cannot be made.

At present this office is awaiting quotations from the De La Vergne Machine Company for two cast iron fly wheels which have been loaned us by that company and which it is desired to purchase for use here, they having been found to be satisfactory, and a statement of charges is being prepared of expense chargeable to you on account of

your failure to comply with the terms of the contract.

By Direction:

Very respectfully,

C. D. SNIFFIN,  
*Captain, A. Q. M. USMC.*  
*Asst. Post Quartermaster.*

Reading Steel Casting Co.,  
Reading, Pa."

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"UNITED STATES MARINE CORPS,  
Office of the Post Quartermaster,  
Marine Barracks, Quantico, Va.,  
September 3, 1919.

Sirs:

Referring to your contract with this office dated September 4, 1918, for two cast steel fly wheels which have been delivered by you to the De La Vergne Machine Company, New York, in accordance with the contract, you are informed that the wheels in question are hereby rejected due to defective workmanship. As these wheels are still at the plant of the De La Vergne Machine Company, who have urgent need for the space they are occupying, shipping instructions are requested by early mail or they will be returned to you by freight collect. It is urgent that shipping instructions be given in time to be communicated to the De La Vergne Machine Company on or before the 10th instant.

In accordance with the provisions of paragraph 6 of the contract, this office is negotiating with the De La Vergne Machine Company for the purchase of two fly wheels which we have been using as a loan and which have proven entirely satisfactory. This purchase will be considered as a purchase against your account in lieu of enforcing an otherwise satisfactory compliance with the

terms of the contract. According to the terms of your contract, any excess in cost over your contract price would be charged to your account, but in this case there will be no excess as the amount involved is less than the wheels furnished by you would have cost.

There are, however, two outstanding invoices of the De La Vergne Machine Company which are chargeable to you, as follows:

Invoice #5885 .....	\$676.96
Invoice #9124 .....	137.25
	<hr/>
	\$814.20

These invoices cover the machining of these two rejected wheels and as the work was of no benefit to the Government, due to flaws discovered in machining, the expense involved is properly chargeable to you.

As it is necessary that this matter be closed at an early date, it is requested that you take the following action in order to effect settlement:

- (a) Furnish shipping instruction for the rejected wheels.
- (b) Settle invoices of the De La Vergne Machine Company amounting to \$814.20 by forwarding check in their favor to this office for delivery.

An early reply will be appreciated.

Very respectfully,

H. C. ROOSEVELT.

*Lieut. Colonel, A. W. M., USMC.*

*Post Quartermaster.*

Reading Steel Casting Co.,  
Reading, Pa.

Copy of this communication sent to:  
Globe Indemnity Co.,  
New York."

(Defendant closes.)

PLAINTIFF'S REBUTTAL EVIDENCE.

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MR. DECHANT, recalled.

By MR. WAGNER:

Q. What has been your experience with the construction and set-up of flywheels? Name some of the plans with which you personally have been connected?

A. My experience has been largely in connection with the making of these flywheels—

Q. Yes.

A. Not so much with the set-up of them, or the erection of them in the engines where they are used, but in the making of them. I cannot tell you where they are. We made them at Reading.

Q. How do they compare in size with the flywheels which were manufactured for the Marine Corps at Quantico?

MR. WADE: I object to this, upon the ground that it is not rebuttal.

THE COURT: What do you propose to rebut?

MR. WAGNER: I want to prove by the witness that the welding which was done on these flywheels was properly done, and that the wheels were fit for the use for which they were made, as they were cast; and I want to prove his ability to testify as to that.

THE COURT: There is no question of his competency to testify as an expert, but why is not that part of your case in chief? Did not this witness testify on that very point?

MR. WAGNER: My case in chief was that they were accepted, and evidence of subsequent rejection has been put in. Now, my offer is to prove that there were no grounds upon which that rejection could have been properly made.

THE COURT: I do not see why it is not part of your case in chief. If you omitted it due to misapprehension or for any other reason, I won't shut you out on that ground; but did not you introduce evidence on that—or it may have been on the cross-examination, I am not sure which; but I am certain this witness testified as to the quality of these castings, both unwelded and welded.

MR. WAGNER: There was testimony that the welding was improperly made, and that that is the basis of the rejection. Now, this testimony is directed to the proof that this welding was not improperly made.

THE COURT: If you have not gone into it, I will permit you to go into it.

MR. WADE: I would like to call the Court's attention to the fact that that point is raised—the question is raised in the pleadings. That is really the only question I see present, and I gave notice in the opening, before any testimony was taken, that that would be the only objection we would press.

THE COURT: If you were trying the case before a jury, I would be more strongly inclined to adhere to the strict rule, as to the character of the testimony. It is in chief. There is no question about that. If counsel did not go into it, you are not affected by who had the last say.

MR. WADE: I appreciate that, your Honor, but at the same time I would respectfully ask that you grant me an exception, on the record.

THE COURT: I will let you have it. The objection is overruled. Counsel is permitted to show any facts.

(Exception noted for the defendant, by direction of the Court.)

By MR. WAGNER:

Q. Mr. Kates and Commander Smeallie testified that the welding which was done on these wheels appeared to be surface welding. I understood that you inspected these wheels after they were welded; is that correct?

A. Yes.

THE COURT: Is that a correct version of their testimony? That question was asked, and all I heard was that you couldn't tell; that it covered up the crack, and you could not see through the steel and could not tell whether the crack had been cleaned.

MR. WAGNER: Commander Smeallie's report on this is in evidence——

THE COURT: I thought you objected to it, and I sustained your objection.

MR. WAGNER: No, I objected to Lieutenant Davis's report. This report is in.

By MR. WAGNER:

Q. You examined this welding after it was completed, on the second wheel?

A. Yes.

Q. Can you tell whether or not it was surface welding?

A. No; I cannot tell whether it was or not, but the chances are——

MR. WADE: That is objected to, what the chances are.

By MR. WAGNER:

Q. If the welding is not properly done, what is the result?

A. The metal will not stay at the weld; it will fall out.

Q. In other words, if the crack is not properly cleaned out, the metal will not remain in the crack?

A. It will not adhere, yes.

Q. There was testimony to the effect that cast iron wheels are now being used in Quantico; do you know by whom they were made?

MR. WADE: That is objected to.

THE COURT: Read the question.

(Question repeated.)

THE COURT: What difference does it make?

MR. WAGNER: Question withdrawn.

By MR. WADE:

Q. In welding, it is customary to clean the crack to the bottom?

A. Yes.

Q. I suppose it is possible to weld without cleaning the crack to the bottom?

A. Not in the sense that you welded the crack up, no; you can cover the crack.

Q. Can you tell by inspecting a weld, after it had been done, and the weld had cooled, whether or not the crack had been cleaned to the bottom and the metal had been filled up from the bottom of the crack—filled in from the bottom of the crack?

A. Was any machining to be done on it?

Q. No.

A. Just the raw weld?

Q. Yes.

A. No.

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MR. MOORE, recalled.

By MR. WAGNER:

Q. Did you receive this letter from the Post Quartermaster at Quantico?

MR. WADE: I would like to inquire what this is to rebut.

MR. WAGNER: The letter of September 3d which was offered in evidence states that two fly-



wheels were rejected. This is a subsequent statement, that one of the wheels was not rejected.

MR. WADE: Well, the letter speaks for itself.

THE COURT: He has to prove it, before it speaks for itself.

By MR. WAGNER:

Q. Answer the question.

A. Yes.

MR. WAGNER: I offer in evidence letter dated December 6th, 1919, from the Marine Corps at Quantico, office of the Post Quartermaster, addressed to the Reading Steel Company, with copies of two letters attached, or two reports attached.

MR. WADE: I object to the copies of the reports that are attached to the letter as offered by counsel for the plaintiff.

MR. WAGNER: Then, I call upon the defendant to produce the originals.

MR. WADE: We don't have them.

THE COURT: What is the objection, that they are copies?

MR. WADE: Yes.

THE COURT: Objection overruled.

(Exception noted for the defendant, by direction of the Court.)

THE COURT: That is something sent to you?

MR. WADE: No, sir; something he received. He is offering it in evidence.

MR. WAGNER: This is a copy of an inter-department letter between the solicitor of the Navy Department and the Major General Commandant of the Marine Corps, which is the basis of the—if your Honor please, Mr. Wade has just produced the original letter, of which these endorsements are part, and one was offered in evidence hereto-

fore. I now offer the entire letter, with the seven endorsements.

MR. WADE: I now move, on behalf of the defendant, to strike from the record the testimony taken under our objection.

THE COURT: What is the purpose, Mr. Wagner, of offering these papers, the ones you just showed me?

MR. WAGNER: The correspondence that I have just offered in evidence shows that if there was a rejection on September 3d, that it was regarded as not being final, and that this was the final, if there was any.

THE COURT: What was the final rejection?

MR. WAGNER: That letter, (pointing to letter) is the first mention of the rejection.

THE COURT: You have something in your mind that you have not put in mine.

I understood when you made the offer, and when I ruled on it, that you were offering this in rebuttal on the theory that the defendant had offered testimony that both these flywheels were rejected, and what you now offer is to show that only one—

MR. WAGNER: The last paragraph of that letter, on the first page, shows that.

THE COURT: I cannot grasp what is in your mind at all. That is altogether an "if" proposition: "Necessary steps to have a large fly-wheel inspected are being taken by this office, and if this wheel proves satisfactory it will be accepted, and if faulty, the whole contract should then be cancelled"—how do you get out of that anything approaching an acceptance?

MR. WAGNER: Not an acceptance; but the letter of September 3d is a rejection of both wheels,

and the letter of December 6th, the same year, says the one wheel had not been rejected.

(The papers last above offered in evidence were marked "Plaintiff's Exhibit A-1.")

(Copy of Exhibit A-1 follows):

"File No. 1450-1-24. UNITED STATES MARINE CORPS,  
Office of the Post Quartermaster,  
Marine Barracks, Quantico, Va.,  
October 11, 1919.

From: Post Quartermaster.

To: The Quartermaster, Marine Corps, Washington, D. C.

Subject: Fly Wheels for Power Plant.

References: (a) Contract dated 9-4-18, with Reading Steel Casting Co., Reading, Pa., Schedule Q-178, 2 cast steel fly wheels.

(b) Contract dated 9-3-18, De La Vergne Machine Co., N. Y., Sch. Q-180-Machining fly wheels.

(c) Contract dated 8-15-18, De La Vergne Co., N. Y., Sch. Q-170, Oil Engine.

Enclosures: 22.

1. The enclosed correspondence is self-explanatory and is forwarded with request for instructions.

2. The circumstances shown by this correspondence are briefly as follows: Owing to the fact that the De La Vergne Machine Company would not guarantee that their engines, reference (c) would run in parallel with the cast iron fly wheels and as they could not furnish steel fly wheels, contract was made with the Reading Steel Casting Company for two cast steel fly wheels under date of September 4, 1918, under authority of the War Industries Board. In accordance with the terms of this contract, these castings are to be delivered at the works of the De La Vergne Machine

Co., New York, where they were to be machined under reference (b) and shipped to this post for use in connection with the two De La Vergne oil engines purchased under reference (c). The castings were finally delivered at the works of the De La Vergne Machine Company and in machining them flaws were discovered. The Reading Steel Casting Company has attempted to repair these flaws by welding, but this office is not satisfied that they are safe and rejected them as per letter of September 3, 1919, copy enclosed, based upon report of inspection by Captain Louis S. Davis, AAQM., USMC., of same date.

3. During the time these steel fly-wheels were being repaired and during the delay incident to their inspection, etc., the De La Vergne Machine Company loaned two cast iron fly wheels to this post for use with their engines in order that they could be placed in operation. As these wheels have been found to be satisfactory for permanent use, and as the two engines concerned have been running in parallel with these wheels for four months, the question of their purchase was taken up with the De La Vergne Machine Company and under date of August 8, 1919, they submitted an offer to sell them for a total of \$4,242.83, which covers all their accounts against this office with the exception of bills amounting to \$814.20 for machining the rejected fly wheels.

4. In regard to statements of the Reading Steel Casting Company dated September 26, 1919, that Lieut. Dechant placed this order with us on the positive assurance that he would personally inspect the castings, and that his acceptance or rejection would be final, and that the castings were made, inspected and finally passed by Lieut. Dechant, it is stated that if Lieut. Dechant gave such assurances he did so entirely without authority as he had absolutely no right to assume

such responsibility. The Lieutenant Dechant in question is the Lieutenant (jg) Frederick H. Dechant, C. E. C., U. S. N. R. F., assistant to the Public Works Officer at the time the order was placed by this office with the Reading Steel Casting Company, and later Public Works Officer at this post. He had nothing to do with the placing of the order other than to recommend that the contract be awarded to the Reading Steel Casting Company and to request them to submit quotation. He had no authority to give any positive assurances of any kind as stated above.

5. It is recommended that these papers be referred to the Bureau of Steam Engineering, Navy Department, with request that one of their inspectors thoroughly examine these rejected castings which are now at the works of the De La Vergne Machine Co., Foot of East 138th Street, New York, N. Y. In the event that this inspector recommends rejection of the castings, the following authority and instructions are requested:

(a) Authority to purchase from the De La Vergne Machine Company two cast iron fly wheels now in use here at a total cost of \$4,242.83, this purchase to be made against the account of the Reading Steel Casting Company.

(b) Instructions as to whether or not payment of bills of the De La Vergne Machine Company amounting to \$814.20, for machining the rejected fly wheels under reference (b), should be made.

6. As the De La Vergne Machine Company is demanding that these castings be removed from their plant, it is requested that this inspection be made and that the authority and instructions requested herein be furnished at the earliest practicable date. It is also

requested that enclosures be returned to this office when they have served their purpose.

H. C. ROOSEVELT.

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*1st Endorsement.* October 11, 1919.

Office of the Post Commander, Marine Barracks,  
Quantico, Va.

From: The Post Commander.

To: The Quartermaster, Marine Corps.  
Washington, D. C.

1. Forwarded.

P. M. BANNON.

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27805.

*2nd Endorsement.*

Headquarters Marine Corps, Quartermaster's Department,

Washington, October 15, 1919.

From: The Quartermaster.

To: The Chief of the Bureau of Steam Engineering.

Subject: Fly wheels for power plant, Marine Barracks,  
Quantico, Va.

References: (a) Letter, P. Q. M., Quantico, to Q. M.,  
10-11-19; attached.

(b) Contract, Dated 9-4-18, with the  
Reading Steel Casting Company,  
Reading, Pa.

Schedule #Q-178, for 2 cast steel fly  
wheels; copy enclosed.

(c) Contract dated 9-3-18, with the De  
La Vergne Machine Co., New York,  
Schedule #Q-180, for machining 2  
sets steel castings of fly wheels; copy  
enclosed.

- References: (d) Contract, dated 8-15-18, with the De La Vergne Machine Co., New York, Schedule #Q-170, for oil engines; copy enclosed.
- (e) Memo. letter, Louis S. Davis, to P. Q. M., Quantico, 9-3-19; enclosed.
- (f) Letter, Reading Steel Casting Co., Reading, Pa., to Capt. C. D. Sniffin, M. B., Quantico, Va., 9-26-19; enclosed.

Enclosures: (5).

1. Referred, with the request that one of the inspectors of the Bureau of Steam Engineering call at the office of the De La Vergne Machine Company, foot East 138th Street, New York, N. Y., for the purpose of inspecting the two fly wheels, mentioned in attached correspondence and making recommendation as to whether or not these fly-wheels should be rejected by the Marine Corps, taking into consideration the terms of the three contracts, of which copies are enclosed. It is requested that these papers be returned to this office together with the recommendation of the inspector, as mentioned above, the intention being to base the action taken by the Marine Corps in this case upon the report submitted by your inspector.

C. L. McCawley.

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452064-761-S      *3rd Endorsement.*    October 18, 1919.

From:    Bureau of Steam Engineering.

To:      Inspector of Machinery, De La Vergne Machine Co., Foot E. 138th St., New York.

Subject: Fly wheels for power plant, Marine Barracks, Quantico, Va.

1. Forwarded, attention invited to the attached correspondence.

2. It is requested that the fly wheels referred to, in the attached correspondence be thoroughly examined and a report on same be submitted to the Quartermaster, U. S. Marine Corps, as requested in the 2nd Endorsement hereon.

C. L. McCawley. By direction.

Copy to Quartermaster, Headquarters Marine Corps,  
Quartermaster's Department, Washington, D. C.

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*4th Endorsement.*

Office of Naval Inspector of Machinery, U. S. N., De  
La Vergne Machine Company, Ft. E. 138th St.,  
New York, 22 October, 1919.

From: Naval Inspector of Machinery.

To: Quartermaster, Marine Corps.

Via: Bureau of Steam Engineering.

1. Returned.

2. I have examined the two fly wheels in question and find as follows:

(a) There are two steel fly wheels at this plant; one has been machined, the other has not. The smaller of the two after machining showed shrinkage cracks at junction of each spoke with the rim, on inside of hub bore and at corners on link slots (keyway where two halves are held together at rim). The wheel was returned to contractor, Reading Steel Casting Co., for remedying defects. All cracks are welded up, except what are perhaps the most important; those in link slots. There are no means of knowing how deep the other cracks were found to be, nor how well they were searched and cleaned. The Reading Company also had welded on and filled in several depressions on the faces of the rims. Unless these were excessively deep, there would be no occasion for this, especially as this



now necessitates re-planing and returning, bringing the thickness of rim still farther below blue-print size. However, this latter is not so important a matter.

3. I recommend rejection of the smaller fly wheel for the reasons:

- (1) Cracks existing at link slots.
- (2) Remedying of serious shrinkage cracks at junction of rim and spokes by what has all the appearance of merely surface welding.
- (3) Unsuitability for service of a heavy fly wheel welded in so many places.

4. The larger fly wheel is still in the rough state as it came from the foundry. No defects can be detected at present, but inasmuch as the cracks of the smaller wheel were not discovered until surface machined, it is quite probable that this one is also defective. Until a more definite reason than probability is found, however, this casting cannot be rejected and should stand as acceptable until machining proves it otherwise.

J. M. SMEALLIE, *Commander, USN.*

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452064-76-S.    *5th Endorsement.*    October 25, 1919.

From:    Bureau of Steam Engineering.

To:       Quartermaster, U. S. Marine Corps, Washington, D. C.

Subject: Fly wheels for power plant, Marine Barracks, Quantico, Va.

1. Returned, attention invited to the attached report of the Inspector of Machinery, De La Vergne Machine Co., Foot E. 138th St., New York City, contained in the 4th Endorsement hereon.

SNIFFIN.

4945-450.

*6th Endorsement.*

Headquarters, Marine Corps, Quartermaster's Department, Washington, November 6, 1919.

From: The Major General Commandant.

To: Solicitor, Navy Department, Washington, D. C.

Subject: Purchase of fly wheels for power plant at Marine Barracks, Quantico, Va.

References: (a) P. Q. M., M. B., Quantico, Va., to Q. M., letter 1450-1-24, dated October 11, 1919, attached.

(b) Contract with De La Vergne Machine Co., dated August 15, 1918 (copy enclosed).

(c) Contract with De La Vergne Machine Co., dated September 3, 1918, (copy enclosed).

(d) Contract with Reading Steel Casting Co., dated September 4, 1918, (copy enclosed).

(e) P. Q. M., M. B., Quantico, Va. to Reading Steel Casting Co., letter 1450-2-17, dated September 3, 1919, (copy enclosed).

(f) Naval Inspector of Machinery to Q. M., 4th endorsement, dated October 22, 1919, on reference (a), (enclosed).

Enclosures: 22.

1. Referring to references (a) to (f), and in view of the circumstances in this case, as shown by enclosed correspondence, an opinion is requested as to the legality of the methods of procedure as outlined by the Post Quartermaster, Marine Barracks, Quantico, Va., in references (a) and (e), or in view of the provisions of paragraphs 6 of reference (d) as to the legality of cancell-

ing the contract with the Reading Steel Casting Company, outright; making payment to the De La Vergne Machine Company in the amount of \$814.20 for machining the rejected fly wheel mentioned in paragraph 5 (b) of reference (a), and charging such amount to the account of the contractor in question under the provisions of reference (d).

2. Paragraph 4 of reference (f) which reads as follows, would seem to indicate that a definite statement cannot be obtained as to the defects of the other fly wheel until the surface is machined:

“Until a more definite reason than probability is found, however, this casting cannot be rejected and should stand as acceptable until machining proves it otherwise.”

4945-450.

11-6-19.

It is not considered, however, to the advantage of the Government to continue further with this contract with the Reading Steel Casting Company, but to follow either of the two outlined plans if such may be considered legal, and it can be shown that the Reading Steel Casting Company has not lived up to its contract.

3. Return of all papers requested.

GEORGE BARNETT.

Copy furnished the Quartermaster.

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*7th Endorsement.*

26275-30  
S-McC-Dr.

Navy Department,  
Office of the Solicitor,  
November 20, 1919.

From: Solicitor.

To: The Major General Commandant, U. S. Marine Corps.

Subject: Purchase of fly wheels for power plant at Marine Barracks, Quantico, Va. (Letter reference a).

*Plaintiff's Exhibit A-1*

- References: (a) P. Q. M., M. B., Quantico, Va., to Q. M., letter 1450-1-24, dated October 11, 1919, attached.
- (b) Contract with De La Vergne Machine Co., dated August 15, 1918, (copy enclosed).
- (c) Contract with De La Vergne Machine Co., dated September 3, 1918, (copy enclosed).
- (d) Contract with Reading Steel Casting Co., dated September 4, 1918, (copy enclosed).
- (e) P. Q. M., M. B., Quantico, Va. to Reading Steel Casting Co., letter 1450-2-17, dated September 3, 1919, (copy enclosed).
- (f) Naval Inspector of Machinery to Q. M., 4th endorsement, dated October 22, 1919, on reference (a), (enclosed).

Enclosures: (a) Reference (d).

(B) Blueprint.

(C) Reference (c)

(D) Reference (b).

(E) Memo. Sept. 3-19, Louis S. Davis to Post Quartermaster, Quantico.

(F) Let. Sep. 26-19, Reading Steel Casting Co., to office of Post Quartermaster, Quantico.

(G) Reference (e).

(H) Let. Aug. 23-19, De La Vergne Machine Co., to Post Quartermaster, Quantico.

(I) Let. #496, Aug. 12-18, Pub. Wks. Off. to Post Quartermaster, Quantico.

- Enclosures: (J) Let. Aug 3-18, Reading Steel Casting Co., to Pub. Wks. Off., Quantico.
- (K) Let. Aug. 8-18, De La Vergne Machine Co., to Pub. Wks. Off., Quantico.
- (L) Let. Aug. 9-18, De La Vergne Machine Co., to Pub. Wks. Off., Quantico.
- (M) Let. Aug. 8-19, De La Vergne Mach. Co., to U. S. Marine Corps, Quantico.
- (N) Copy let. 1730:2-16 Aug. 5-19, Asst. Post Quartermaster to De La Vergne Mach. Co.
- (O) Let. Aug. 2-19, De La Vergne Mach. Co., to Post Quartermaster, Quantico.
- (P) Let. July 8-19, De La Vergne Mach. Co., to Asst. Quartermaster, Quantico.
- (Q) Copy Let. 2099 June 10-19, Pub. Wks. Officer to Post Quartermaster.
- (R) Copy let. June 3-19, Pub. Wks. Officer to De La Vergne Mach. Co.
- (S) Copy Let. May 1-19, Lt. C. E. C., U. S. N. R. F., to De La Vergne Mach. Co.
- (T) Copy Let. Apl. 26-19, Lt. C. E. C. U. S. N. R. F., to Reading Steel Casting Co.
- (U) Let. June 2-19, De La Vergne Mach. Co. to Pub. Wks. Officer, Quantico.
- (V) Let. May 1-19, De La Vergne Mach. Co., to Pub. Wks. Officer, Quantico.

- Enclosures: (W) Triplicate copies of Invoices Nos. 9122, 9123, 9124, 9125, 9121, and single copies of 5885, 5808, 7071, De La Vergne Machine Co., to Post Quartermaster, Quantico.
- (X) 2d End. May 8-19, Pub. Wks. Officer to Post Quartermaster.
- (Y) Let. May 5-19, Reading Steel Casting Co., to Quartermaster, Quantico, and two endorsements.
- (Z) Invoice 82976 in Quintruplicate, Reading Steel Casting Co., to Quartermaster, Quantico.
- (AA) Invoice 83831, Reading Steel Casting Co., to Marine Corps, Quantico.
- (BB) Original combination Purchase Order and Public Bill in Sextuplicate, Reading Steel Casting Co.
- (CC) Let. Apl., 26-19, Pub. Wks. Office to Post Quartermaster.
- (DD) Let. Apl. 26-19, De La Vergne Mach. Co., to Atten., Lt. F. H. Dechant, Quantico.
- (EE) Let. Feb. 17-19, Pub. Wks. Officer to Post Quartermaster transmitting copy of Let. Feb. 15-19, Reading Steel Casting Co., to Lieut. Fred H. Dechant.
- (FF) Copy Let. Feb. 12-19, Post Quartermaster to De La Vergne Machine Company.
- (GG) Let. Feb. 3-19, De La Vergne Mach. Co., to Post Quartermaster, Quantico.

Enclosures: (HH) Let Feb. 4-19, De La Vergne Mach. Co., to Post Quartermaster, Quantico.

(II) Let. Jany. 29-19, Reading Steel Casting Co., to Marine Corps, Quantico, and three endorsements.

(JJ) Copy Order No. 45142 A of Reading Steel Casting Company.

(KK) Copy Order No. 45142 B of Reading Steel Casting Company.

1. Under the terms of the contract of September 4, 1918, it was agreed in Clause 2, that these fly-wheels shall, upon delivery or completion, and as a condition precedent to the acceptance thereof be inspected, examined, and approved by the officer or officers authorized by the United States to inspect and examine same; and that if not so approved will be rejected and shall be removed by, and at the expense of, the Contractor immediately after the receipt of written notification of such rejection.

2. Under date of September 3, 1919, Louis S. Davis, in a Memo. to Post Quartermaster reports having inspected the fly-wheels and recommends "that these castings not be used."

3. Under date of September 3, 1919, the Post Quartermaster definitely rejected the wheels in question due to defective workmanship. The statement in the letter of September 26, 1919, from the Reading Steel Casting Company to Office of Post Quartermaster, Quantico, (Enclosure F) that "The Castings were made, inspected and finally passed by Lieutenant Dechant," probably refers to the inspection of these fly-wheels, as set forth in enclosure (CC). This inspection was not made for the purpose of passing upon the wheels under the Contract of September 4, 1918; but to determine the efficacy of the repairs and welds. However, there is nothing else found to support such contention.

The letter of August 3, 1918, from the Contractor, to the Public Works Officer (Enclosure J) indicates the requirements of the Marine Corps regarding these castings and that inspection was to be made after delivery to the De La Vergne Machine Company.

4. It is the opinion of this office that had action stopped here, the above would have been sufficient to have permitted the Post Quartermaster to contract for both wheels under Clause 6 of the contract of September 4, 1918.

5. No circumstances set forth in the enclosures, however, disclose any reason for making the machining of these castings a charge against the Contractor.

6. The Marine Corps having referred the question of acceptance or rejection of these fly-wheels, to the Bureau of Steam Engineering under the 2d Endorsement, it is the opinion of this office, in view of the Bureau's report, that the rejection of the larger wheel for supposed defects should be treated as erroneous and should be rescinded. The small fly-wheel should be rejected by approval by the Marine Corps of the 4th endorsement hereon. If the larger fly-wheels is machined and defects develops, it should be rejected and the whole of the Contract of September 3, 1918, cancelled.

7. This office sees no reason for not purchasing the two cast iron fly-wheels now in use; but that this purchase be made against the account of the Reading Steel Casting Company under clause 6 of the contract as to both wheels, depends upon the final rejection of the larger wheel. The smaller wheel may be so charged, if its rejection is approved.

8. Payment for machining these fly-wheels should be made the De La Vergne Machine Company.

GRAHAM.

Approved: R. E. Coontz, Acting Secretary of the Navy.



27805. *8th Endorsement.*

Headquarters, Marine Corps, Quartermaster's  
Department,

Washington, November 26, 1919.

From: The Quartermaster,

To: Post Quartermaster, Marine Barracks, Quantico, Va.

Subject: Purchase of fly-wheels for power plant at  
Marine Barracks, Quantico, Va.

References: (a) P. Q. M., M. B., Quantico, Va., to Q.  
M., letter 1450-1-24, dated October 11,  
1919, attached.

(b) Contract with De La Vergne Machine  
Co., dated August 15, 1918, (copy  
enclosed).

(c) Contract with De La Vergne Ma-  
chine Co., dated September 3, 1918,  
(copy enclosed).

(d) Contract with Reading Steel Casting  
Co., dated September 4, 1918, (copy  
enclosed).

(e) P. Q. M., M. B., Quantico, Va., to  
Reading Steel Casting Co., letter  
1450-2-17, dated September 3, 1919,  
(copy enclosed).

(f) Naval Inspector of Machinery, to Q.  
M., 4th endorsement, dated October  
22, 1919, on reference (a), (enclosed).

Enclosures: 27.

1. Reference (a) is returned, attention in this connection being directed to the opinion of the Solicitor for the Navy Department, as expressed in the 7th endorsement. In accordance therewith this office approves the rejection of the small cast steel fly wheel as recommended in paragraph 3 of the 4th endorsement, and the Reading Steel Casting Company should be

notified immediately to remove such wheel at its own expense from the plant of the De La Vergne Machine Company, as provided for in paragraph 2 of reference (d).

2. You will take the necessary steps to have the large fly wheel machined and inspected, and if it proves satisfactory, it must be accepted; if faulty, the whole contract should then be cancelled.

3. The cost of machining these fly wheels is not a proper charge against the Reading Steel Casting Company, but must be paid for by the Government, under the provisions of reference (c).

4. The purchase of the cast iron fly wheels from the De La Vergne Machine Company at their revised quotation, total amount \$4307.08, as referred to in the enclosed letter from such firm, dated November 3, 1919, is approved, and formal contract should be made by you with the above mentioned firm to cover this purchase, charging the amount involved to the appropriation "Maintenance, Q. D., M. C., 1920," sub-head "Contingent." In this connection, however, your attention is directed to paragraph 7 of the 7th endorsement which reads as follows:

"This office sees no reason for not purchasing the two cast iron fly-wheels now in use; but that this purchase be made against the account of the Reading Steel Casting Company under clause 6 of the contract as to both wheels, depends upon the final rejection of the larger wheel. The smaller wheel may be so charged, if its rejection is approved."

5. If, however, as it appears that the cost of the cast iron fly wheels is less than the cost of the cast steel fly wheels, there will be no question of charging any excess of cost to the present contractor, (the Reading

Steel Casting Company), and it will merely amount to a cancelation of the contract of the Reading Steel Casting Company, either in part, as you are now authorized to do in paragraph 7 of the 7th endorsement, quoted *supra*, or in the whole, if the large fly wheel proves faulty after machining.

6. If, on the other hand, the large cast steel fly wheel is not faulty, it must be accepted and paid for, and suitable arrangement as to its disposition in the best interests of the Government will have to be made.

7. In this connection, it is stated that the receipt of the attached correspondence was the first information received by this office regarding the loan of these cast iron fly-wheels by the Post Quartermaster. This action, on the part of the Post Quartermaster is irregular and is not considered to be warranted under the circumstances, in that telephonic authority could have been obtained from this office no matter how urgent the necessity was for the use of these borrowed fly-wheels.

C. L. McCawley.

7th Endorsement, Headquarters U. S. Marine Corps, Commandant's Office. Forwarded Nov. 29, 1919.

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dds                      8th endorsement. December 1, 1919.  
Office of the Post Commander, Marine Barracks,  
Quantico, Va.

From: The Post Commander.

To: The Post Quartermaster.

Subject: Purchase of fly wheels for power plant at  
Marine Barracks, Quantico, Virginia.

Enclosures: 27.

1. Forwarded.

R. D. Foote,  
By direction.

File No. 5-5- 5-23.

UNITED STATES MARINE CORPS,  
Office of the Post Quartermaster,  
Marine Barracks,  
Quantico, Va., December 6, 1919.

Sirs:

Please refer to your letter of September 26th, 1919, JTM:CH., relative to your contract with this office Schedule #Q-178, dated September 4th, 1919.

In accordance with the terms of above mentioned contract you are informed that the one (1) flywheel (print FH-549) is hereby rejected for the following reasons:

- (a) Crack existing at link slots.
- (b) Remedying of serious shrinkage cracks junction of rim and spokes by what has all the appearance of merely surface welding.
- (c) Unsuitability for service of a heavy flywheel welded in so many places.

A copy of letter of the Naval Inspector of Machinery dated October 22d, 1919, sustaining the undersigned from a technical stand point is enclosed herewith.

You will further consider the contract in relation to this one flywheel as cancelled. A copy of letter of the Solicitor for the Navy Department is forwarded herewith for your information and which is the justification legally for this action.

Immediate steps will be taken by your company to remove the rejected wheel from the premises of the De La Vergne Machine Co., all expenses in connection with this action will be borne by the Reading Steel Casting Co.

The necessary steps to have the large flywheels machined and inspected are being taken by this office,

and if this wheel proves satisfactory, it will be accepted, if faulty, the entire contract will be cancelled.

A Copy of this communication is being forwarded to your surety, the Globe Indemnity Co., New York, for their information.

Acknowledgment of this letter requested with advices as to action taken relative to the removal of the cancelled and rejected wheel.

Very respectfully,

H. C. ROOSEVELT,  
*Lieut.-Col. A. Q. M.,*  
*U. S. M. C., Post*  
*Quartermaster.*

Reading Steel Casting Co.,  
Reading, Penna."

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THE COURT: What is your motion to strike out, Mr. Wade?

MR. WADE: My motion is to strike out the testimony taken subject to my objection; that is, the testimony taken on rebuttal.

THE COURT: The motion is denied, and an exception allowed the defendant. We will take it for whatever it is worth.

(Counsel for the plaintiff then argued to the Court in support of its claim, and counsel for the Government replied thereto, all of which was not taken for the purpose of the record.)

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And, thereupon, counsel for the said plaintiff did then and there except to the rulings of said court on questions of evidence propounded during the course of the trial, as appears by the foregoing transcript of evidence, which exceptions were duly allowed, and to

such rulings counsel for plaintiff hereby tenders this bill of exceptions to the Court to sign and seal and the Court does hereby sign and seal the same.

And, thereupon, the Court took the said cause under advisement and thereafter, on June 1, 1922, did file its opinion, in accordance with the provisions of the Act of Congress in such case made and provided, as follows:

### OPINION.

SUB TRAIL BY THE COURT SITTING WITHOUT A JURY.  
(Filed June 1, 1922.)

DICKINSON, J.

The following conclusions of law are stated as not in dispute and as the legal propositions upon which the plaintiff rests its right to recover.

1. The contract was for two cast steel flywheels "to be inspected, examined and approved by the officer or officers authorized" for the purpose, and such approval to be a condition precedent to performance.

2. The defendant was bound to accept or reject within a reasonable time after delivery, and failure to inspect and reject within a reasonable time would warrant a finding in favor of the plaintiff, if the contract was in fact performed.

### FACT OUTLINE.

The contract was made September 4th, 1918. Delivery was to be made by October 1, 1918. The flywheels were to be delivered to the De La Vergne Machine Company by whom they were to be machined. The plaintiff was reluctant to enter into the contract. The flywheels were to be of cast steel. The design was that of the Machine Company. Castings of this material and of this design could not be moulded

without what are called checks developing as the metal passed out of the liquid state. The defects arising from these cracks could be remedied by welding, but there was a prejudice against welds. Under these conditions the plaintiff's fear was that the inspection by U. S. inspectors would be so rigorous and the officers passing upon the acceptance of the flywheels so exacting as to make compliance with the contract practically impossible. Lt. H. H. Dechant was however at the time serving as a Government inspector, with the rank of Ensign. He had gone into the Navy from civil life and had a technical and practical knowledge of such work and the conditions under which it was done. He had moreover a knowledge of the plaintiff's plant and its equipment and facilities for turning out work of this character, and was urgent both with the plaintiff and his superior officers that the plaintiff should be given the work to do. The plaintiff's reluctance was overcome by the expectation that Dechant would be the inspector in charge and that his recommendations would be accepted as final, and in reliance upon their confidence in his judgment the contract was made.

There was another circumstance which although it did not consciously influence results doubtless did so. The Government experts wanted the flywheels to be of steel. The Machine Company could supply only cast iron. It was not thought that the latter would serve the purpose intended. There were in consequence two contracts made, one with the Machine Company for what it was to supply and with the plaintiff for the flywheels, and another contract was made with the Machine Company to machine the castings. The Government did not get the wheels as soon as they had need of them, and at first borrowed temporarily from the Machine Company two cast iron

185

wheels. These were found upon trial to answer to the required purposes and were subsequently bought and kept installed permanently. The interests of the Machine Company and of the Government were thus brought into conflict with the interests of the plaintiff. The checks would not show up until the castings had been machined. When the necessity, for welding developed, the wheels had to be sent back to the plaintiff and then returned to the Machine Company. Had this necessity been anticipated by the latter company it would have charged more for the machining. The Government was able to get the iron castings for a less price than the sum the plaintiff was to receive.

We thus get the atmosphere of the contract and the conditions affecting the acceptance of performance, Human nature being what it is, no matter how fair everyone tried to be, inspection and examination would inevitably be more critical than if the purchaser had been in as urgent need of the flywheels at the time of performance as when the contract was made.

The facts must however be found as the evidence shows them to be. There would seem to be no controversy over the fact that there was no actual acceptance of the flywheels by the defendant. At all events this must be the finding made. The plaintiff has evidently anticipated this because its counsel had rested its case upon the proposition that failure to reject within a reasonable time after delivery relieves the plaintiff of the condition of acceptance.

We have already found this proposition in plaintiff's favor. It is in accord with the general principles of the law and is the doctrine declared by the Sales Act. The whole controversy in consequence resolves itself into a question of fact. The pertinent dates are as follows:



September	4, 1918	Contract for one small and one large wheel.
October	1, 1918	Contract date of delivery.
November	30, 1918	Small wheel shipped to De La Vergne Company for machining.
December	27, 1918	Large wheel shipped. Arriving date does not appear other than that it was after January 9th and before February 4, 1919.
February	4, 1919	Dechant recommended payment of half of bill.
February	9, 1919	Small casting inspected by Dechant.
February	10, 1919	Condemned with suggestion that it might be welded.
February	15, 1919	Plaintiff requests return of casting offering to weld.
February	17, 1919	Inspector recommends acceptance of offer to weld.
February	20, 1919	Sent back to plaintiff for welding.
March	27, 1919	Small casting returned after welding.
April	26, 1919	Small wheel inspected and acceptance recommended Dechant. Wheel not then remachined.
April	26, 1919	Large wheel not machined, but recommendation made that if checks appeared they should be welded.
April	30, 1919	Dechant again recommended payment of half of bill.

May	1, 1919	Voucher passed.
May	5, 1919	Machine Co. asked to do further welding.
May	6, 1919	Dechant reinspected.
May	21, 1919	Quartermaster notifies plaintiff.
After May	21, 1919	and before July 16th, 1919 defendant decided to buy the cast iron wheels and then had no use for plaintiff's wheels.
July	16, 1919	Plaintiff notified wheels had not been accepted.
September	3, 1919	Accepted by Lieutenant Davis.
September	3, 1919	Plaintiff notified wheel rejected.
September	9, 1919	Plaintiff protests this action.
October	11, 1919	Commander Smeallie ordered to make inspection.
October	22, 1919	Inspection by Commander Smeallie. Small wheel condemned. Large wheel not then machined and because of this not condemned.
October	25, 1919	Opinion of department solicitor asked.
October	26, 1919	Large wheel inspected and condemned.
November	20, 1919	Advised by solicitor. Small wheel properly rejected. Large wheel not to be rejected until machined and found defective.
November	26, 1919	Department approved rejection of small wheel. Large wheel ordered inspected and to be rejected if defective.

- December 6, 1919 Plaintiff notified of rejection of small wheel and that large wheel would be inspected and accepted or rejected.
- October 20, 1920 Large wheel inspected and rejected.

*DISCUSSION.*

The contract and these dates tell the whole story, except the actual condition of the castings. A contract of this general character has two aspects. There is first the feature of performance. The vendor must perform or he cannot recover the contract price. There is also the feature of acceptance. In this respect it is a purchase upon condition. The condition is that what is tendered be acceptable to the vendee. The rejection must, of course, be in good faith, and meet the test of the exercise of reasonable judgment. Within these limits the vendee is free to reject, but here again he must exercise his right within a reasonable time. The good faith here of any judgment of rejection would not be open to question. We have, in consequence, the two points involved of acceptance within a reasonable time and performance. Every contract must be construed in the light of its subject matter and the conditions surrounding it. These castings could not be made without the expectation of their showing checks. These could be remedied and be practically removed by welding. The checks could not be developed until after the castings had been machined. They were to be delivered to the De La Vergne Company for this purpose. Inspection after machining was in time.

The fact finding is made that checks were in each of the wheels so that neither was acceptable nor in compliance with the contract without welding but after this would have conformed to the specifications. There is

no controversy over the first fact, and the weight of the evidence supports the second. Had Dechant remained in the service or had the department not had the opportunity to supply itself with other flywheels at a less price, none could doubt that the castings would have been made acceptable and would have been accepted. There is no thought of reflection upon any one in making this comment. It simply means that the attitude of the persons who were dealing with each other and the whole situation had changed. Dechant rejected the first or smaller casting. The plaintiff acquiesced in this and undertook to do the required welding. It had confidence in him and he was considerate of the difficulties involved in the work. Unfortunately he left the service shortly after the first casting had been submitted for the second inspection. Whatever defects the second machining would have disclosed, the plaintiff would, without doubt, have removed. The faith of Dechant in the plaintiff induced him to recommend that a part of the contract price be paid. This recommendation was accepted and acted upon to the extent of the issuance of a voucher for 50 per cent. of the total price. Had this voucher been paid, all controversy would have undoubtedly been avoided. Again, unfortunately, it was not paid. As no check followed the voucher, the plaintiff of course became insistent upon payment and time and again asked for its money.

The other unfortunate circumstance to which we before alluded here intervened. The De La Vergne Company were being paid for one job of machining. They found themselves expected to do more work, or at least to do it piecemeal. To this naturally it objected. The result was delay due to nothing being done. The demands of the plaintiff for payment urged the Quartermaster's Department to action. In every large concern the system adopted to aid in getting

things done is apt to override in importance what is to be done. It is so with Governmental departments. The everchanging personnel almost compels this. Any one could have foretold what happened. The records of the department showed no acceptance of either casting. They did show an inspection and rejection of the smaller flywheels with an approved recommendation that the plaintiff be permitted to close the checks by welding.

The records further showed that the plaintiff was overdue in delivery, and that the Government was no longer in need of the castings. The plaintiff was thereupon formally notified that neither wheel had been accepted and another officer was ordered to inspect. As the wheels in their then condition were not acceptable, he of course recommended rejection and both wheels were rejected. This consumed four months of time, and formal notice of rejection was not given until September 3, 1919. The protest made by plaintiff to this action caused the department to review what had been done, and a special inspector was ordered to examine the castings. This was done in October, 1919, and the advice of the solicitor of the department was sought. In consequence of the advice received the officer concluded that the rejection of the larger wheel, which has not been machined and the condition of which because of this could not be certainly known, was unjustified. The action of September was accordingly revoked; the rejection of the small wheel was confirmed, and the plaintiff was notified that the large wheel would be accepted or rejected, according as it was found to comply or not to comply with the contract. This notice was given December 6, 1919. After this nothing was done until a suit was brought by the plaintiff. Then another inspection was had, and the large wheel also rejected, and the plaintiff so notified October 26, 1920.

A mere glance over this series of dates forces the mind to certain definite conclusions. One is that the plaintiff was in default in the time of delivery. No point was made of this, however, and the time of delivery was extended. Another is that the right of the vendee to inspect and extend was not exercised as to the large wheel within a reasonable time.

This, however, is not all, nor does it touch the real merits of the case. The plaintiff was bound to perform its contract. Even if relieved of the condition of precedent inspection and acceptance, it was not relieved of its obligation of substantial performance. The case is within the principle that a government cannot be deprived of its rights by a failure or neglect of duty on the part of its officials. The condition of inspection and acceptance is not an obstacle to the plaintiff after a reasonable time allowed for this, but the plaintiff cannot recover on a contract which it did not perform, and this failure of consideration may be interposed as a defence. This means that if the castings were up to contract, the plaintiff can recover, otherwise not. The weight of the evidence, and indeed almost the admission is made that the castings did not comply with the contract. The plaintiff, instead of relying, as it seems to have done, on the passing of the voucher, should have made sure there were no defects in the castings. This it did not do, and, in consequence, cannot recover.

#### FACT FINDINGS.

1. The plaintiff failed to perform its contract in that the castings were defective because of the presence of checks.

2. These defects could have been remedied by welding, and the castings thus made to conform to contract.

3. The extent of the cracks and the consequent required welding could not be determined until after the castings had been machined.

4. Plaintiff sent the castings to the company which was to do the machining, and plaintiff was given the privilege of welding the cracks when disclosed by the machining.

5. This welding was, however, not done nor the castings made as required by the contract.

6. The smaller casting which was the first casting supplied was inspected and rejected within a reasonable time. After partial welding it was again inspected and rejected within a reasonable time.

7. The large casting was not inspected until after a reasonable time. This wheel was shipped December 27, 1918, and reached its destination before February 7, 1919. It had not been inspected on December 6, 1919, and notice of inspection and rejection was not given until October 26, 1920, after suit brought.

#### CONCLUSIONS OF LAW.

1. The contract of the plaintiff was to supply castings acceptable to defendant after inspection.

2. The defendant was bound to inspect within a reasonable time after opportunity to so do.

3. The plaintiff was bound to furnish flywheels reasonably fit for the purposes of the use intended. Checks or cracks, such as existed in these wheels, made them unfit for use and not a compliance with the contract unless the defects were remedied by welding.

4. The plaintiff had not performed its contract until after the castings had been welded, and it was bound to have the welding done.

5. The defendant is entitled to judgment, with costs.

## JUDGMENT.

Judgment is entered in favor of the defendant and against the plaintiff, with costs.

And, thereupon, counsel for the said plaintiff did except to the foresaid opinion of the said Court, which exceptions were thereupon granted by the said Court, as appears by plaintiff's exceptions, which were as follows:

PLAINTIFF'S EXCEPTIONS TO FINDINGS OF  
FACT AND CONCLUSIONS OF LAW.

(Filed June 9, 1922.)

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AND Now, June 9, 1922, the plaintiff respectfully excepts to the findings of fact and conclusions of law of the learned trial Judge, as follows:

1. To the first finding of fact as follows:

"The plaintiff failed to perform its contract in that the castings were defective because of the presence of checks,"

in that the said finding is contrary to and against the weight of evidence.

2. To the second finding of fact as follows:

"These defects could have been remedied by welding, and the castings thus made to conform to contract,"

in that the said finding is contrary to and against the weight of evidence.

3. To that portion of the fourth finding of fact as follows:

"Plaintiff was given the privilege of welding the cracks when disclosed by the machining,"



in that the said finding is contrary to and against the weight of evidence.

4. To the fifth finding of fact as follows:

"This welding was, however, not done nor the castings made as required by the contract,"

in that the said finding is misleading and contrary to and against the weight of evidence.

5. To the sixth finding of fact as follows:

"The smaller casting which was the first casting supplied was inspected and rejected within a reasonable time. After partial welding it was again inspected and rejected within a reasonable time,"

in that the said finding is contrary to and against the weight of evidence.

6. To the first conclusion of law, as follows:

"The contract of the plaintiff was to supply castings acceptable to defendant after inspection."

7. To the third conclusion of law, as follows:

"The plaintiff was bound to furnish fly wheels reasonably fit for the purposes of the use intended. Checks or cracks, such as existed in these wheels, made them unfit for use and not a compliance with the contract unless the defects were remedied by welding."

8. To the fourth conclusion of law, as follows:

"The plaintiff had not performed its contract until after the castings had been welded, and it was bound to have the welding done."

9. To the fifth conclusion of law, as follows:

"The defendant is entitled to judgment, with costs."

10. To the following conclusion of law:

“The contract was for two cast steel fly wheels ‘to be inspected, examined and approved by the officer or officers authorized’ for the purpose, and such approval to be a condition precedent to performance.”

11. To the following conclusion of law:

“The defendant was bound to accept or reject within a reasonable time after delivery, and failure to inspect and reject within a reasonable time would warrant a finding in favor of the plaintiff, if the contract was in fact performed.”

12. In failing to find as a fact as follows:

“Castings of the material and design provided for by the contract could not be moulded without what are called cracks or checks developing as the metal passes out of the liquid state.”

13. In failing to find as a fact as follows:

“In the manufacture of castings of the character provided for by the contract in suit it is customary and usual, because of the impossibility of moulding such castings without the development of cracks or checks, to give to the manufacturer an opportunity of welding any cracks so disclosed after machining, and such custom is an implied term of every such contract and of the contract in suit.”

14. In failing to find as a fact as follows:

“All machining of the castings to be made and delivered by the plaintiff was to be done by the De La Vergne Machine Company, in accordance with a contract made by the Government with that company.”

15. In failing to find as a fact as follows:

“Plaintiff was not given the opportunity of welding the cracks disclosed in the smaller fly wheel by the second machining.”

16. In failing to find as a fact as follows:

“Plaintiff was never given the opportunity of welding any cracks disclosed in the larger fly wheel by machining.”

17. In failing to hold as a conclusion of law that the inspection and rejection of the large flywheel after suit brought was not within a reasonable time.

18. In failing to hold as a conclusion of law that the giving of notice of inspection and rejection of the large flywheel on October 26, 1920, after suit brought was not within a reasonable time.

19. In failing to hold as a conclusion of law that plaintiff was entitled to judgment.

(Sgd.) PAUL C. WAGNER,  
(Sgd.) H. ROBERT MAYS,  
*Attorneys for Plaintiff.*

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Exceptions granted, June 9, 1922.

(Sgd.) O. B. DICKINSON,  
*J.*

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ORDER SEALING BILL OF EXCEPTIONS.

And, inasmuch as the said opinion so excepted to does not appear on the record, the said counsel for plaintiff does hereby tender this bill of exceptions to the said opinion to the Court to sign and seal and the Court does hereby sign and seal the same.

AND NOW, THEREFORE, plaintiff, by its counsel, presents the foregoing as its bill of exceptions in this cause and prays that the same may be settled and allowed and signed and sealed by the Court, as provided by law.

(Sgd.) PAUL C. WAGNER,  
(Sgd.) H. ROBERT MAYS,  
*Attorneys for Plaintiff.*

This bill of exceptions settled and allowed this twenty-third day of June, 1922.

(Sgd.) O. B. DICKINSON,  
*J.*

Approved:  
(Sgd.) T. D. WADE,  
*Assistant U. S. Attorney.*

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PRÆCIPE TO ENTER JUDGMENT.  
(Filed November 4, 1922.)

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Sir:

Enter judgment in favor of the defendant and against the plaintiff, with costs.

(Sgd.) GEORGE W. COLES,  
*United States Attorney.*

To the Clerk,  
U. S. D. C.,  
E. D. of Pa.

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JUDGMENT.  
(Filed November 4, 1922.)

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Before DICKINSON, *J.*

AND NOW, November 4, 1922, by præcipe filed, judgment in accordance with the opinion of the Court

is hereby entered in favor of defendant and against the plaintiff.

By THE COURT,

Attest:

(Sgd.) E. G. JOHNSON,  
*Deputy Clerk.*

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PETITION FOR WRIT OF ERROR.

(Filed November 21, 1922.)

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*To the Honorable Oliver B. Dickinson, Judge of said Court:*

And now comes Reading Steel Castings Company, plaintiff in the above entitled cause, by Paul C. Wagner and H. Robert Mays, its attorneys, and feeling itself aggrieved by the final judgment of this Court rendered and entered in the above entitled cause against it and in favor of the United States of America, defendant, on the fourth day of November, 1922, hereby prays that a writ of error may be allowed to it from the United States Circuit Court of Appeals for the Third Circuit to the District Court of the United States for the Eastern District of Pennsylvania, and, in connection with this petition, petitioner, herewith presents its assignments of error, fully setting forth therein the reasons for the prayer of this petition.

Petitioner further prays that citation be issued according to law, and that a transcript of the record, proceedings and documents upon which said judgment was rendered and made, duly authenticated, be ordered sent to the United States Circuit Court of Appeals for the Third Circuit under the rules of such Court in such cases made and provided, in order that the same

may be inspected and corrected in accordance with law and justice.

And your petitioner will ever pray.

READING STEEL CASTINGS COMPANY,

By (Sgd.) PAUL C. WAGNER,

(Sgd.) H. ROBERT MAYS,

*Its Attorneys.*

Dated: November 21, 1922.

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ORDER ALLOWING WRIT OF ERROR.

(Filed November 24, 1922.)

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Before DICKINSON, J.

On reading of the petition of Reading Steel Castings Company, plaintiff and plaintiff-in-error, for writ of error, and the assignments of error, and upon due consideration of the record of said cause:

IT IS ORDERED, that a writ of error be allowed from the United States Circuit Court of Appeals for the Third Circuit to the District Court of the United States for the Eastern District of Pennsylvania, as prayed for in said petition; that said writ of error and citation thereon be issued, served and returned to the United States Circuit Court of Appeals for the Third Circuit in accordance with law, and that a certified transcript of record, exhibits and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Third Circuit, upon condition that the said petitioner and plaintiff-in-error give security in the sum of two hundred and fifty dollars (\$250), that the said plaintiff-in-error shall prosecute said writ of error to effect and, if said plaintiff-in-error fail to make his plea good, shall answer to the defendant-in-error for all costs and damages that may be adjudged and decreed on account of said writ of error.

And the plaintiff-in-error now presenting a bond in the sum of two hundred and fifty dollars (\$250), with Indemnity Insurance Company of North America as surety, It Is ORDERED that the same be and hereby is duly approved.

By THE COURT,

Attest:

(Sgd.) GEORGE BRODBECK,

*Clerk.*

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ASSIGNMENT OF ERRORS.

(Filed November 21, 1922.)

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And now comes Reading Steel Castings Company, plaintiff and plaintiff-in-error in the above entitled cause, by Paul C. Wagner and H. Robert Mays, its attorneys, and in connection with its petition for a writ of error says that in the record, proceedings, and in the final judgment of the District Court of the United States for the Eastern District of Pennsylvania aforesaid, manifest error has intervened to the prejudice of the plaintiff and plaintiff-in-error, to wit:

1. The learned Court erred in entering judgment for defendant, in that said judgment is contrary to law.

2. The learned trial Judge erred in making the first finding of fact as follows:

“The plaintiff failed to perform its contract in that the castings were defective because of the presence of checks”

in that the said finding is contrary to and against the weight of evidence.

3. The learned trial Judge erred in making the second finding of fact as follows:

“These defects could have been remedied by welding, and the castings thus made to conform to contract”

in that the said finding is contrary to and against the weight of evidence.

4. The learned trial Judge erred in finding that portion of the fourth finding of fact, which is as follows:

“Plaintiff was given the privilege of welding the cracks when disclosed by the machining”

in that the said finding is contrary to and against the weight of evidence.

5. The learned trial Judge erred in making the fifth finding of fact as follows:

“This welding was, however, not done nor the castings made as required by the contract”

in that the said finding is misleading and contrary to and against the weight of evidence.

6. The learned trial Judge erred in making the sixth finding of fact as follows:

“The smaller casting which was the first casting supplied was inspected and rejected within a reasonable time. After partial welding it was again inspected and rejected within a reasonable time”

in that the said finding is contrary to and against the weight of evidence.

7. The learned trial Judge erred in the first conclusion of law, as follows:

“The contract of the plaintiff was to supply castings acceptable to defendant after inspection.”



8. The learned trial Judge erred in the third conclusion of law, as follows:

“The plaintiff was bound to furnish fly wheels reasonably fit for the purposes of the use intended. Checks or cracks, such as existed in these wheels, made them unfit for use and not a compliance with the contract unless the defects were remedied by welding.”

9. The learned trial Judge erred in the fourth conclusion of law, as follows:

“The plaintiff had not performed its contract until after the castings had been welded, and it was bound to have the welding done.”

10. The learned trial Judge erred in the fifth conclusion of law, as follows:

“The defendant is entitled to judgment, with costs.”

11. The learned trial Judge erred in the following conclusion of law:

“The contract was for two cast steel fly wheels ‘to be inspected, examined and approved by the officer or officers authorized’ for the purpose, and such approval to be a condition precedent to performance.”

12. The learned trial Judge erred in the following conclusion of law:

“The defendant was bound to accept or reject within a reasonable time after delivery, and failure to inspect and reject within a reasonable time would warrant a finding in favor of the plaintiff, if the contract was in fact performed.”

13. The learned trial Judge erred in failing to find as a fact as follows:

“Castings of the material and design provided for by the contract could not be molded without what are called cracks or checks developing as the metal passes out of the liquid state,”

in that said fact was established by undisputed evidence and stated to be a fact in the Court's opinion.

14. The learned trial Judge erred in failing to find as a fact as follows:

“In the manufacture of castings of the character provided for by the contract in suit it is customary and usual, because of the impossibility of molding such castings without the development of cracks or checks, to give to the manufacturer an opportunity of welding any cracks so disclosed after machining, and such custom is an implied term of every such contract and of the contract in suit,”

in that said fact was established by undisputed evidence and stated to be a fact in the Court's opinion.

15. The learned trial Judge erred in failing to find as a fact as follows:

“All machining of the castings to be made and delivered by the plaintiff was to be done by the De La Vergne Machine Company, in accordance with a contract made by the Government with that Company,”

in that said fact was established by undisputed evidence and stated to be a fact in the Court's opinion.

16. The learned trial Judge erred in failing to find as a fact as follows:

“Plaintiff was not given the opportunity of welding the cracks disclosed in the smaller fly wheel by the second machining,”

in that said fact is established by undisputed evidence.

17. The learned trial Judge erred in failing to find as a fact as follows:

“Plaintiff was never given the opportunity of welding any cracks disclosed in the larger fly wheel by machining,”

in that said fact is established by undisputed evidence.

18. The learned trial Judge erred in failing to hold as a conclusion of law that the inspection and rejection of the large flywheel after suit brought was not within a reasonable time.

19. The learned trial Judge erred in failing to hold as a conclusion of law that the giving of notice of inspection and rejection of the large flywheel on October 26, 1920, after suit brought was not within a reasonable time.

20. The learned trial Judge erred in failing to hold as a conclusion of law that plaintiff was entitled to judgment.

21. The learned trial Judge erred in sustaining objection to plaintiff's offer of proof as follows:

“By MR. WAGNER:

Q. I hand you letter dated August 3d, plaintiff's Exhibit B, the first sentence of which says—

‘In accordance with our verbal understanding with you assistant’——

MR. WADE: That is objected to, if your Honor please——

THE COURT: You are still antecedent to the contract. Objection sustained.

(Exception noted for the plaintiff, by direction of the Court.)

MR. WAGNER: I would like to make an offer of proof. This question is for the purpose of proving

that the terms of the contract are such that the proposals shall constitute part of the contract, and the proposals refer to verbal understandings as between the officer of the United States Government and the plaintiff.

THE COURT: Is that objected to?

MR. WADE: Yes.

THE COURT: Sustained.

(Exception noted for the plaintiff, by direction of the Court.)"

(Sgd.) PAUL C. WAGNER,

(Sgd.) H. ROBERT MAYS,

*Attorneys for Plaintiff.*

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PRÆCIPE FOR TRANSCRIPT.

(Filed November 21, 1922.)

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SIR:

You will please incorporate in the transcript copy of the docket entries, writ of error, plaintiff's petition, defendant's answer, bill of exceptions, judgment, petition for writ of error, assignments of error, order allowing writ of error and clerk's certificate.

(Sgd.) PAUL C. WAGNER,

(Sgd.) H. ROBERT MAYS,

*Attorneys for Reading  
Steel Castings Com-  
pany.*

To the Clerk of said Court.

November 21, 1922.

CLERK'S CERTIFICATE.

---

UNITED STATES OF AMERICA,  
EASTERN DISTRICT OF PENNSYLVANIA, } *Sct.:*

I, GEORGE BRODBECK, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of so much of the pleas and proceedings, in the case of Reading Steel Casting Company v. United States of America, No. 6834, March Term, 1920; as per *præcipe* filed, a copy of which is hereto annexed, the transcript of record in the above entitled cause is to include, and now remaining among the records of said court in my office.

(Seal) IN TESTIMONY WHEREOF I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this first day of December in the year of our Lord one thousand, nine hundred and twenty-two and in the one hundred and forty-seventh year of the Independence of the United States.

GEORGE BRODBECK,  
*Clerk.*

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD  
CIRCUIT, OCTOBER TERM, 1922

No. 2950

READING STEEL CASTINGS Co., Plaintiff in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error

And afterwards, to wit on the 10th day of April, 1923, and the 9th day of October, 1923, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley, and Honorable J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 22nd day of November, 1923 come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

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In the United States Circuit Court of Appeals for the Third Circuit,  
October Term, 1922

No. 2950

READING STEEL CASTING COMPANY, Plaintiff-in-error,

vs.

UNITED STATES OF AMERICA, Defendant-in-error

In Error to the District Court of the United States for the Eastern  
District of Pennsylvania

Before Buffington, Woolley and Davis, Circuit Judges

PER CURIAM: After an opinion had been filed in the above entitled cause indicating affirmance and reversal of portions of the judgment below, the defendant in error filed a petition for a rehearing, maintaining for the first time that under the Act of March 3, 1887, 24 Stat. 505, known as the Tucker Act, as amended by the Judiciary Act of 1891, and Section 24, Paragraph 20, and Section 297, Paragraph 7, of the Judicial Code of March 3, 1911, 36 Stat. 1087, this court is without jurisdiction to issue and entertain this writ of error. The contention is based on the ground that judgments of district courts rendered in actions brought under the cited statutes are reviewable directly and exclusively by the Supreme Court of the United States. *Chase vs. United States*, 155 U. S. 489; *Reed vs.*

United States, 211 U. S. 529; Fritch vs. United States, 248 U. S. 458. Being persuaded to this view, we allowed the petition. At the hearing the plaintiff in error conceded that, under the cited statutes, the court is without jurisdiction, but urged that, instead of dismissing the case for want of jurisdiction, it should be transferred to the Supreme Court of the United States in accordance with the Act of September 14, 1922, 42 Stat. 837, Section 238 (a) of the Judicial Code. Heitler vs. United States, 260 U. S. 438; Pothier vs. Rodman, — U. S. —, 67 L. Ed. 410. Being of the same opinion we vacate the order previously made and direct that by an order properly drawn the case be transferred to the Supreme Court of the United States.

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Endorsements: 2950. Opinion Per Curiam. Received & Filed Nov. 22, 1923. Saunders Lewis, Jr., Clerk.

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In the United States Circuit Court of Appeals for the Third Circuit,  
October Term, 1922

No. 2950

READING STEEL CASTING COMPANY, Plaintiff-in-error,

vs.

UNITED STATES OF AMERICA, Defendant-in-error

In Error to the District Court of the United States for the Eastern  
District of Pennsylvania

On consideration of the motion of counsel for the plaintiff in error to transfer the record and proceedings herein to the Supreme Court of the United States.

It is now here ordered by this court, under and by force of the Act of September 14, 1922, 42 Stat. 837, that this cause be, and the same is hereby, transferred to the Supreme Court of the United States at the costs of the plaintiff in error.

Per Curiam.

Buffington, Circuit Judge.

November 22, 1923.

Endorsements: 2950. Order Transferring Case to Supreme Court under Act of Sept. 14, 1922. Received & Filed Nov. 22, 1923. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA,  
Eastern District of Pennsylvania,  
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original transcript of record as filed in this Court, together with per curiam opinion and order thereon in the case of: Reading Steel Castings Co., Plaintiff in Error, vs. United States of America, Defendant in Error, No. 2950, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 26th day of November in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the United States the one hundred and forty-eighth.

Saunders Lewis, Jr., Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal of United States Circuit Court of Appeals, Third Circuit.)

Endorsed on cover: File No. 29,990. U. S. Circuit Court of Appeals, Third Circuit. Term No. 680. Reading Steel Casting Company, plaintiff in error, vs. The United States of America. In error to the District Court of the United States for the Eastern District of Pennsylvania, transferred from the United States Circuit Court of Appeals for the Third Circuit pursuant to Act of Congress of September 14, 1922. File December 5th, 1923. File No. 29,990.



FILED

JAN 23 1925

WM. R. STANSBURY  
CLERK

No. 233.

October Term, 1924.

IN THE  
**Supreme Court of the United States.**

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**READING STEEL CASTING COMPANY,**  
*Plaintiff-in-Error,*  
*v.*

**UNITED STATES OF AMERICA.**

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**In Error to the District Court of the United States  
for the Eastern District of Pennsylvania.**

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**Brief for Plaintiff-in-Error.**

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**PAUL C. WAGNER,**  
*Attorney for Plaintiff-in-Error.*

**International, 236 Chestnut St., Philadelphia.**

*Paul C. Wagner*



## INDEX

	Page
Names of the Parties .....	1
Statement of the Case .....	2
A. The Large Flywheel .....	2
B. The Small Flywheel .....	6
Specification of Errors .....	8
Argument .....	9
A. The Large Flywheel .....	9
(1) Failure to Reject Within a Reasonable Time Must Be Considered an Acceptance .....	10
B. The Small Flywheel .....	16
(1) When the Facts Are Undisputed, the Question of What is a Reasonable Time is One of Law and Hence Subject to Review by This Court .....	17
(2) Failure to Reject Within a Reasonable Time Must Be Considered an Acceptance .....	21
C. Conclusion .....	22

## TABLE OF CASES.

### B.

Blair v. Ford China Co., 20 Pa. Super. Ct. 374 .....	14
Bradford Piano Co., J. B., v. Baal, 166 Wis. 134, 164 N. W. 822, .....	20

### F.

Foss-Schneider Brewing Co. v. Bullock, 59 Fed. 83 .....	12, 17
---	--------

### H.

Hellmers v. Norris, 201 Ky. 401, 257 S. W. 4 .....	14, 19
--	--------

# **INDEX—Continued.**

## **TABLE OF CASES—Continued.**

	Page
<b>J.</b>	
Jacobsohn v. Carey, 59 Pa. Super. Ct. 4 .....	13
Jones v. Werthan Bag Co., 301 Mo. 186, 254 S. W. 4 .....	14
<b>M.</b>	
Miller v. Tiffany, 1 Wall. 298, 17 L. Ed. 540 .....	14
Morgan v. McKee, 77 Pa. 228 .....	18
<b>O.</b>	
Ohio Electric Co. v. Wisconsin-Minnesota, etc., Co., 161 Wis. 632, 155 N. W. 112 .....	14 ,
Owens Co., J. L., v. Whitcomb, 165 Wis. 92, 160 N. W. 161 ..	19
<b>P.</b>	
Pope v. Allis, 115 U. S. 363, 29 L. Ed. 393 .....	12
<b>R.</b>	
Rosenfield v. Swenson, 45 Minn. 190, 47 N. W. 778 .....	14
<b>S.</b>	
Stone v. Frohlich, 168 Mich. 128, 133 N. W. 951 .....	19
Supreme Council v. McAlarney, 135 Fed. 72 .....	19
<b>U.</b>	
United States v. Smoot, 15 Wall. 36, 21 L. Ed. 107 .....	10
United States v. Newport, etc., Co., 178 Fed. 194 .....	10
<b>W.</b>	
Wiggins v. Burkham, 10 Wall. 129, 19 L. Ed. 884 .....	17

## **TABLE OF STATUTES.**

Act of Congress of March 3, 1887, 24 Stat. 505 .....	1, 8
Judicial Code of March 3, 1911, 36 Stat. 1087 .....	8
Act of Congress of September 14, 1922, 42 Stat. 837 .....	8
Penna. Act of May 19, 1915, P. L. 543 .....	12

IN THE

# Supreme Court of the United States

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October Term, 1924. No. 233.

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READING STEEL CASTING COMPANY,  
*Plaintiff-in-Error,*

*v.*

UNITED STATES OF AMERICA.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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## BRIEF FOR PLAINTIFF-IN-ERROR.

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### I. STATEMENT OF THE CASE.

This is an action by Reading Steel Casting Company, a corporation of the State of Pennsylvania, with its principal office in Reading, Pennsylvania, plaintiff-in-error here and plaintiff below, against the United States of America, defendant-in-error here and defendant below, instituted by petition (Record, p. 4), in accordance with the provisions of paragraphs 5-7 of the Act of Congress of March 3, 1887 (24 Stat. 506; U. S. Comp. Stat. 1913, Sects. 1575-1577) to recover \$7581.85, the purchase price of two flywheels manufactured for and delivered to the defendant in accordance with and under a written contract between the parties.

An answer (Record, p. 15) was filed by the defendant setting up as defenses (a) that the contract

was not binding upon the defendant because the officers signing the same on its behalf had no authority to do so, and (b) that the flywheels delivered failed to comply with the specifications of the contract and were, therefore, rejected.

The case was tried by the Court without a jury. The contract (Record, p. 27), the execution and validity of which were admitted at the time of the trial (Record, p. 26), is dated September 4, 1918, and provides for the manufacture and delivery by the plaintiff of two flywheels (one large and one small) cast in halves. The contract was signed on behalf of the defendant by the Post Quartermaster of the Marine Barracks of the United States Marine Corps at Quantico, Virginia, the flywheels being for use at the Marine Barracks at Quantico. These flywheels were to be cast in the rough according to specifications set forth in blueprints which were prepared and supplied by the De La Vergne Machine Company, of New York City, and attached to the contract (Record, pp. 28 and 66). It was further provided that delivery was to be made f. o. b. Reading on bill of lading addressed to the De La Vergne Machine Company (Record, p. 28). The wheels upon delivery were to be machined by the latter company in accordance with the contract which it had with the defendant (Record, p. 138).

The facts with reference to the delivery and subsequent inspection and rejection of the two flywheels are such that they should be considered separately.

**A. THE LARGE FLYWHEEL.** The two halves of the large flywheel were shipped from Reading on December 27, 1918 (Record, p. 84). They weighed 41,040 pounds and an invoice for their purchase price, \$4719.50, was sent to the Post Quartermaster at Quantico, Virginia, on the same day (Record, p. 84).

From January 9, 1919, to May 5, 1919, numerous letters were sent by the plaintiff to the Post Quar-

termaster at Quantico requesting payment of the invoices previously submitted, amounting to \$7581.85, covering the two flywheels (the facts relating to the delivery of the small flywheel are stated hereafter), and making inquiry as to the reasons why no payments had been made (Record, pp. 84-92). The first response made by the Post Quartermaster to these letters was on May 5, 1919, when a voucher for \$3790.98, one-half of the cost of both wheels, was sent to the plaintiff with a letter of transmittal requesting that the voucher be signed by it—

“in order that this account may be placed in course of payment” (Record, p. 92).

This voucher was signed and returned to the Post Quartermaster (Record, pp. 96-99).

On May 14, 1919, the plaintiff again wrote to the Post Quartermaster requesting—

“that you advise whether you have been able to identify these items and pass same for payment, or if there is any question on same. In that event kindly advise promptly in order that we may properly adjust this matter, as these charges are so long past due we feel same should receive immediate attention.

“Trusting, therefore, to hear from you promptly as to reason for withholding payment, or to receive your remittance” (Record, p. 94).

To this letter of May 14, a reply, dated May 21, 1919, was received as follows:

“Relative to your letter of the 14th instant (b:S), the Engineering Officer at this post advises that the final possible action in regard to the flywheels will result in the Marine Corps returning the steel wheels castings, in which event the proper adjustment of all costs incurred both as to yourselves and to the De La Vergne Machine Company will be settled on that basis.

"This action, inasmuch as the test of the two new power units in parallel with the cast wheels is expected to give satisfactory results, which will warrant their retention as they stand.

"You may expect final word relative to above in the immediate future" (Record, p. 95).

On May 22, 1919, and June 9, 1919, the plaintiff again wrote to the Post Quartermaster at Quantico requesting payment of the invoices (Record, pp. 96 and 99).

No reply to these letters was received for more than a month. Finally, under date of July 16, 1919, the Post Quartermaster at Quantico wrote to the plaintiff as follows (Record, p. 106):

"Referring to your communication No. 29 of the 9th instant, B:S, regarding payment of your invoices for \$2862.35 and \$4719.60, you are informed that as to date you have not satisfactorily fulfilled the requirements of your contract and the flywheels have not been accepted, payment cannot be made.

"At present this office is awaiting quotations from the De La Vergne Machine Company for two cast-iron flywheels, which have been loaned us by that company and which it is desired to purchase for use here, they having been found to be satisfactory, and a statement of charges is being prepared of expense chargeable to you on account of your failure to comply with the terms of the contract."

On September 3, 1919, a letter was received by the plaintiff rejecting both wheels because of defective workmanship (Record, p. 157). Captain Sniffin, who was at that time located at the Marine Barracks at Quantico, testified that an inspection had been made by a Captain Davis, who made a written report dated September 3, 1919 (Record, p. 150). This report is not in evidence nor is there any evidence as to the



identity, authority or qualifications of the Captain Davis referred to, nor is there any evidence showing in what the alleged "defective workmanship" consisted.

On September 26, 1919, the plaintiff wrote to the Post Quartermaster stating that the wheels had already been accepted and that the plaintiff could not recognize the attempted rejection of September 3d (Record, p. 154).

This letter was referred by the Post Quartermaster to the authorities at Washington.

Between October 18 and October 22, 1919, Commander J. M. Smeallie, U. S. N., inspected the flywheels at the plant of the De La Vergne Machine Company in New York City. His report with reference to the large flywheel is as follows:

"4. The larger fly wheel is still in the rough state as it came from the foundry. No defects can be detected at present, but inasmuch as the cracks of the smaller wheel were not discovered until surface machined, it is quite probable that this one is also defective. Until a more definite reason then probability is found, however, this casting cannot be rejected and should stand as acceptable until machining proves it otherwise." (Record, p. 145.)

Commander Smeallie's report was then referred to the Solicitor of the Navy Department for an opinion, as a result of which the Post Quartermaster at Quantico was instructed to reject the small flywheel and to have the large one machined and inspected. The entire correspondence between the various Government offices, relative to Commander Smeallie's inspection and the subsequent proceedings, is in the Record (pp. 165-181). On December 6, 1919, the Post Quartermaster at Quantico replied to the plaintiff's letter of September 6th enclosing a copy of Comman-

der Smeallie's report and stating the following with reference to the large wheel:

"The necessary steps to have the large flywheels machined and inspected are being taken by this office, and if this wheel proves satisfactory it will be accepted, if faulty, the entire contract will be cancelled" (Record, p. 182).

The petition in this case was filed on April 9, 1920. Commander Smeallie testified that he inspected the large flywheel in October, 1920, making a report dated October 26th, recommending the rejection of that wheel. It is not known whether any action whatever was taken as a result of this inspection (Record, p. 148).

**B. THE SMALL FLYWHEEL.** The two halves of the small flywheel were shipped from Reading on November 30, 1918 (Record, p. 83). They weighed 24,890 pounds and an invoice for their purchase price, \$2862.35, was sent to the Post Quartermaster at Quantico, Virginia, on the same day (Record, p. 84).

About February 8, 1919, under orders from the Bureau of Navigation, Lieutenant F. H. Dechant, then Public Works Officer at Quantico, went to New York City and there inspected the two halves of the small flywheel, which were then in the plant of the De La Vergne Machine Company (Record, pp. 53-58). As a result of this inspection, the wheel was returned to the plaintiff for electric welding (Record, pp. 59-61).

On March 27, 1919, after the welding had been completed, the wheel was again shipped to the De La Vergne Machine Company (Record, p. 101). About April 22, 1919, it was again inspected by Lieutenant Dechant, under orders from the Bureau of Navigation, at the machine company's plant (Record, pp. 61-64). As a result of this inspection, Lieutenant Dechant made a report to the Post Quartermaster at

Quantico recommending that the small flywheel be accepted (Record, pp. 64 and 75).

The correspondence referred to above between the plaintiff and the Post Quartermaster at Quantico, beginning with the letter to the Post Quartermaster dated January 9, 1919, and ending with the letter from the Post Quartermaster dated July 16, 1919, covered the invoice for the small flywheel as well as that for the large one.

The letter from the Post Quartermaster to the plaintiff dated September 3, 1919, as stated above, rejected the small wheel because of defective workmanship. As a result of the re-inspection by Commander Smeallie and the opinion of the Solicitor of the Navy Department, the facts with reference to which were set forth in full above in connection with the large flywheel, the letter of December 6, 1919, from the Post Quartermaster to the plaintiff formally rejected the small wheel for the reasons set forth in the letter (Record, p. 182).

The amount in controversy is admitted to be \$7581.85 (Record, pp. 84 and 116). No payments were ever made to the plaintiff for these wheels (Record, p. 116).

After trial, the learned trial Judge filed an opinion deciding in favor of defendant with reference to both wheels, holding (a) that the flywheels manufactured and delivered by plaintiff were not in accordance with the terms of the contract, (b) that, although the large flywheel had not been rejected within a reasonable time, no recovery could be had because not in accordance with the contract, and (c) that no recovery could be had for the small flywheel since it had been rejected within a reasonable time. Judgment was accordingly entered for the defendant and against the plaintiff, from which judgment an appeal was taken to the Circuit Court of Appeals for the Third

Circuit. Argument was heard on April 10, 1923, and an opinion subsequently filed confirming the judgment entered below with reference to the small flywheel but reversing it with reference to the large flywheel and directing judgment for the plaintiff for the purchase price of the latter. Subsequently, the defendant filed a petition for a rehearing, maintaining for the first time that, under the Act of March 3, 1887 (24 Stat. 505) as amended by the Judiciary Act of 1891, and Section 24, par. 20, and Section 297, par. 7, of the Judicial Code of March 3, 1911 (36 Stat. 1087), the Circuit Court of Appeals was without jurisdiction. After argument on the petition for rehearing, the case was ordered transferred to this court in accordance with the provisions of the Act of Congress of September 14, 1922 (42 Stat. 837).

## II. SPECIFICATION OF ERRORS.

The assignments of error will be found at pages 201 to 206 of the Record. Those specifically relied upon are the 1st, 6th, 10th, 12th, 18th, 19th and 20th, which are as follows:

“1. The learned Court erred in entering judgment for defendant, in that said judgment is contrary to law.”

“6. The learned trial Judge erred in making the sixth finding of fact, as follows:

“ ‘The smaller casting which was the first casting supplied was inspected and rejected within a reasonable time. After partial welding it was again inspected and rejected within a reasonable time’

in that the said finding is contrary to and against the weight of evidence.”

“10. The learned trial Judge erred in the fifth conclusion of law, as follows:

“ ‘The defendant is entitled to judgment, with costs.’ ”

“12. The learned trial Judge erred in the following conclusion of law:

“ ‘The defendant was bound to accept or reject within a reasonable time after delivery, and failure to inspect and reject within a reasonable time would warrant a finding in favor of the plaintiff, if the contract was in fact performed.’ ”

“18. The learned trial Judge erred in failing to hold as a conclusion of law that the inspection and rejection of the large flywheel after suit brought was not within a reasonable time.”

“19. The learned trial Judge erred in failing to hold as a conclusion of law that the giving of notice of inspection and rejection of the large flywheel on October 26, 1920, after suit brought was not within a reasonable time.”

“20. The learned trial Judge erred in failing to hold as a conclusion of law that plaintiff was entitled to judgment.”

---

### III. ARGUMENT.

In view of the different facts relative to the delivery, inspection and attempted rejection of the two flywheels, which it was deemed necessary to state separately, it is likewise desirable to consider them separately in argument.

#### A. THE LARGE FLYWHEEL.

The large flywheel was shipped from Reading to New York on December 27, 1918 (Record, p. 84). It was in the shops of the De La Vergne Machine Com-

pany in April, 1919, and was inspected there at that time by Lieutenant Dechant (Record, pp. 68 and 70). The letter dated December 6, 1919, from the Post Quartermaster to the plaintiff, in which the small wheel was rejected, stated that the large wheel would be accepted if satisfactory and rejected if found to be defective (Record, p. 182). This suit was instituted on April 9, 1920. An inspection of the large wheel was made in October, 1920, but no notice of rejection given to plaintiff (Record, p. 148).

The only question involved with reference to the large flywheel is whether or not it was accepted. The plaintiff contends that the actions of the defendant were equivalent to an acceptance upon the principle that—

**1. FAILURE TO REJECT WITHIN A REASONABLE TIME MUST BE CONSIDERED AN ACCEPTANCE.**

The learned trial Judge held that the large flywheel was not inspected and rejected until after a reasonable time had elapsed (Record, p. 193), but refused recovery on the ground that plaintiff was entitled to consider defendant's failure to reject as an acceptance only if plaintiff had in fact performed its contract, as is evidenced by the holding of the trial Judge that

“the defendant was bound to accept or reject within a reasonable time after delivery and failure to inspect and reject within a reasonable time would warrant a finding in favor of the plaintiff, if the contract was in fact performed” (Record, p. 184).

The rules relating to the construction and effect of contracts to be applied to contracts made by the Government are the same as those applied to contracts between individuals.

*U. S. v. Smoot*, 15 Wall. 36, 21 L. Ed. 107;  
*U. S. v. Newport, etc., Co.*, 178 Fed. 194 (C.  
 C. A., 4th Ct.).

The general rule of commercial law is that, upon the delivery of goods purchased by sample or per specifications, the purchaser must inspect such goods within a reasonable time after receipt and, if unsatisfactory, notify the seller of their rejection. Benjamin states the rule briefly and clearly as follows (*Benjamin on Sales*, 5th Ed., p. 750):

“When goods are sent to a buyer in performance of the seller’s contract, the buyer is not precluded from objecting to them by merely receiving them, for receipt is one thing, and acceptance another. But receipt will become acceptance if the right of rejection be not exercised within a reasonable time, or if any act be done by the buyer which he would have no right to do unless he were the owner of the goods.”

The rule is stated at greater length in 23 *R. C. L.* 1434:

“257. Reasonableness of Time for Inspection.—It is the duty of the buyer to act promptly in making an examination of goods sent on his order to see whether they comply therewith, and to give prompt notice to the seller of their rejection, if found defective, if he intends to avail himself of that remedy. And without doubt the buyer’s retention of the goods beyond a reasonable time for examination and communication with the seller, standing alone, will be regarded as warranting the conclusion that he has accepted and thus become liable, especially if the delay has worked prejudice to the seller. On the other hand the buyer has a reasonable time for examination and rejection and to give notice thereof, and what is a reasonable time is usually a question of fact, and not of law, to be determined by the jury upon all the circumstances, including as well the situation and liability of injury to the seller from delay as the convenience and necessities of the buyer; but where only one conclusion can reasonably be drawn from the undisputed evidence, it is a question of law.”

The *Sales Act of Pennsylvania* provides as follows (Act of May 19, 1915; P. L. 543, Sec. 48; Penna. Stat. 1920, Sec. 19696):

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

In *Pope v. Allis*, 115 U. S. 363, 29 L. Ed. 393, Mr. Justice Woods stated the rule, as applied to sales by sample, as follows (p. 398):

"And so, when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the buyer, that all the goods are similar, both in nature and quality, to those exhibited, and if they do not correspond, the buyer may refuse to receive them, or if received, he may return them in a reasonable time allowed for examination; and thus rescind the contract. *Lorymer v. Smith*, 1 Barn. & C. 1; *Magee v. Billingsley*, 3 Ala. 679."

In *Foss-Schneider Brewing Co. v. Bullock*, 59 Fed. 83 (C. C. A., 6th Ct.), the defendants, who had agreed to purchase rice from the plaintiff, cancelled the contract of sale. Subsequently, however, the goods were shipped by the plaintiff and were received and stored by the defendants by mistake. The mistake was discovered by the defendants within a week after it was made, but they failed to notify the plaintiff of their rejection of the goods for more than a month. It was held that such failure to reject was equivalent to an acceptance and that the plaintiff could recover the purchase price. The opinion of the Court was delivered by the present Chief Justice. It was held (p. 89):



"It is well settled that receipt of goods will become an acceptance of them, if the right of rejection is not exercised within a reasonable time. *Benj. Sales (Corbin's Ed.)*, p. 916, Sec. 1051, and cases cited. To the knowledge of the brewing company, the rice was delivered to it by Bullock & Co. under the claim of right to do so by virtue of the contract with Burger of November, 1884. Acceptance of it, therefore, or conduct equivalent to acceptance of it, implies, not only an agreement to pay for the rice, but to pay for it in accordance with the contract under which it was avowedly delivered."

In *Jacobsohn v. Carey*, 59 Pa. Super. Ct. 4, a contract of sale provided that the goods delivered should show that they had been manufactured in a union factory. The goods were delivered but were not accompanied by vouchers showing this fact. An action was brought by the plaintiffs for the purchase money and no objection was made because of the absence of the vouchers until after suit was brought. It was held that the plaintiff could recover, the Court holding (p. 7):

"It was the defendants' duty with reasonable promptness to either accept, or reject the goods when delivered. When they discovered a fact which warranted a rescission of the contract it was their duty to act promptly and notify the other party without delay. The defense is to the whole bill. The defendants still have the goods and claim they are not required to pay for them. If the defendants knew, or ought to have known, that the goods were not such as had been contracted for, the right to reject them ought to have been exercised with reasonable promptness and unequivocally: *Tete Bros. v. Eshler*, 11 Pa. Superior Ct. 224; *Morse, Williams & Co. v. Arnfield & Son*, 15 Pa. Superior Ct. 140; *Moneyweight Scale Co. v. Woodward*, 29 Pa. Superior Ct. 142; *Blair v. Ford*

China Co., 26 Pa. Superior Ct. 374; Baltimore Brick Co. v. Coyle, 18 Pa. Superior Ct. 186. They are bound to make their election within a reasonable time and what is a reasonable time is for the Court: *Morgan v. McKee*, 77 Pa. 228; *Davis v. Stuard*, 99 Pa. 295; *Spiegelberg v. Karr*, 24 Pa. Superior Ct. 339."

A few of the cases holding to the same effect are:

*Miller v. Tiffany*, 1 Wall. 298, 17 L. Ed. 540;  
*Jones v. Werthan Bag Co.*, 301 Mo. 186, 254 S. W. 4;  
*Hellmers v. Norris*, 201 Ky. 401, 257 S. W. 4;  
*Rosenfield v. Swenson*, 45 Minn. 190, 47 N. W. 778;  
*Ohio Electric Co. v. Wisconsin, etc., Co.*, 161 Wis. 632, 155 N. W. 112;  
*Blair v. Ford China Co.*, 26 Pa. Super. Ct. 374.

The rule for which the above authorities are cited is well established and it seems difficult to ascertain exactly why the learned trial Judge refused to follow the rule in this case. An examination of the latter part of his opinion indicates that the plaintiff could have recovered only if in the first instance it had tendered to the defendant castings which had been machined and in which any cracks or checks, disclosed by such machining, had been welded. For instance (*Record*, p. 192):

"The condition of inspection and acceptance is not an obstacle to the plaintiff after a reasonable time allowed for this, but the plaintiff cannot recover on a contract which it did not perform, and this failure of consideration may be interposed as

a defense. This means that if the castings were up to contract, the plaintiff can recover, otherwise not. . . . The plaintiff . . . should have made sure there were no defects in the castings. This it did not do, and, in consequence, cannot recover."

If this holding is correct, then it was impossible for the plaintiff to perform its contract without doing work which, by its contract, it was not required to do, but for which the Government had contracted with the De La Vergne Machine Company. The contract provided for the delivery of these flywheels "in the rough" (Record, p. 28). The trial Judge has held that castings of the design required could not be made without checks or cracks developing (Record, p. 185). He further held that the extent of the cracks and the consequent required welding could not be determined until after the castings had been machined (Record, p. 193); and, further, that the castings were to be delivered to the De La Vergne Machine Company for machining (Record, p. 189), in accordance with the contract which the Government had with the machine company. It is, therefore, apparent that the plaintiff could not have determined whether there were any cracks in the wheels at the time they were shipped to the De La Vergne Machine Company and it required a performance by that company of its contract with the Government before this fact could be established and the plaintiff notified thereof. The facts in this case are stronger than those in the cases cited, *supra*, in which the rule has been applied, in that, in this case, the duty of preparing the goods for inspection was assumed by the defendant.

In all the cases cited above, the rule, that failure to reject within a reasonable time amounts to an acceptance, was relied upon *because* the goods delivered were, for some reason, *not* in accordance with the terms of the contract and a recovery was had by the applica-

tion of the rule. If the rule should be as stated by the learned trial Judge, it could never have any application and would not exist. If the plaintiff vendor has in fact performed his contract, he can recover on the contract, as the vendee has no basis for rejection. It is only when the contract has not been fully complied with and there has been no rejection within a reasonable time, that the rule can have any operation.

No rejection of the large flywheel having been made before suit was brought, a period of more than a year after delivery, the learned trial Judge held that it had not been inspected and rejected within a reasonable time. Upon this finding, it is submitted that judgment should have been rendered for the plaintiff for the large wheel.

#### B. THE SMALL FLYWHEEL.

The small wheel was shipped from Reading on November 30, 1918 (Record, p. 83), inspected at the plant of the De La Vergne Machine Company on February 8, 1919, and returned to plaintiff for welding (Record, pp. 53-61), reshipped to New York after welding on March 27, 1919 (Record, p. 101), and reinspected and acceptance recommended on April 22, 1919 (Record, pp. 61-64 and 75). A formal letter rejecting the small wheel was sent to plaintiff on September 3, 1919 (Record, p. 157). Upon plaintiff's protest, a reinspection was ordered and a final letter of rejection sent to plaintiff on December 6, 1919 (Record, p. 182). All of the above facts are undisputed and stated by the learned trial Judge in his opinion (Record, pp. 187-189). It will be noted that a period of five months intervened between the redelivery of the wheel by plaintiff after welding and the attempted rejection in September and a period of seven months between such redelivery and the final letter of rejection in December.

The learned trial Judge held that the small wheel was inspected and rejected within a reasonable time. It is contended that this holding is erroneous and should be so held, on the principal that—

1. WHERE THE FACTS ARE UNDISPUTED, THE QUESTION OF WHAT IS A REASONABLE TIME IS ONE OF LAW AND HENCE SUBJECT TO REVIEW BY THIS COURT.

In *Wiggins v. Burkham*, 10 Wall. 129, 19 L. Ed. 884, the question was whether an account rendered had become an account stated by the lapse of an unreasonable time without objection. Mr. Justice Swayne delivered the opinion of the Court and held (p. 886):

“The proposition that what is reasonable time in such cases is a question for the jury, as laid down by the court below, cannot be sustained. Where the facts are clear, it is always a question exclusively for the court. The point was so ruled by this court in *Toland v. Sprague*, 12 Pet. 336. See, also, *Lockwood v. Thorne*, 11 N. Y. 175, and 2 Pars. Cont., note c, 661. Where the proofs are conflicting, the question is a mixed one of law and of fact. In such cases the court should instruct the jury as to the law upon the several hypotheses of fact insisted upon by the parties.”

In *Foss-Schneider Brewing Co. v. Bullock*, *supra*, the same rule was stated and followed (p. 90):

“Nor do we think that, under the circumstances of this case, the question of reasonable time was one for the jury. There was no excuse for any delay, after the brewing company learned of its mistaken action in regard to the rice, in notifying *Bullock & Co.* of it; and we have no hesitation, as a matter of law, in holding that thirty days' delay in the rejection of rice—a commodity fluctuating in its market price—was altogether unreasonable. *Wiggins v. Burkham*, 10 Wall. 127.”

In *Morgan v. McKee*, 77 Pa. 228, the plaintiff sold 4000 barrels of oil to the defendant, deliveries to be made in monthly instalments. After four instalments had been delivered and accepted, the plaintiff defaulted on the fifth instalment. When the sixth instalment was due, the plaintiff tendered the instalment, but the defendant refused to accept on the ground that the previous instalment had not been delivered in accordance with the terms of the contract. Tenders of the subsequent instalments due were made at the required times and suit was then brought by the plaintiff to recover for the defendant's breach of the contract and the defendant set up its rescission of the contract by reason of the failure to deliver the fifth instalment. A verdict and judgment for the plaintiff were affirmed on the ground that the defendant had not rescinded within a reasonable time, the Court holding, by Mr. Justice Williams (p. 231):

“It was their duty to act promptly on the occurrence or discovery of the breach, and if they were guilty of undue delay, they must be regarded as having waived their right to rescind and elected to treat the contract as still subsisting: *Lawrence v. Dale*, 3 Johns. Ch. R. 23; *Pearsoll v. Chapin*, 8 Wright 9; *Negley v. Lindsay*, 17 P. F. Smith 217; *Leaming v. Wise*, 23 Id. 173. They could not take the chance of a rise in the market price of petroleum, and then elect to rescind the contract or not as might be most for their advantage. They were bound to make their election within a reasonable time: and what is reasonable time or undue delay where the facts are not disputed, is a question of law to be determined by the Court: *Leaming v. Wise*, *supra*. Reasonableness in such cases belongeth to the knowledge of the law, and is therefore to be decided by the justices: 1 Tho. Coke Litt. 644 (52b). Did the defendants then elect to rescind the contract in a reasonable time? The petroleum was deliverable monthly, and the breach of which the complaint was made was the plaintiff's failure

to make the September delivery. They did not elect or give notice of their intention to rescind the contract until the October delivery was due and tendered by the plaintiff. The Court below ruled, and we think rightly, that the delay was unreasonable."

In *Supreme Council v. McAlarney*, 135 Fed. 72 (C. C. A., 3d Ct.), it was held, upon the question of whether plaintiff had objected within a reasonable time to the passage of a by-law by the defendant insurance association which affected his rights (p. 73):

"The action of the defendant in passing and putting into effect the offending by-law did not bind the plaintiff or affect his contract of insurance. But he thereby acquired the right of electing either to treat the attempted reduction of his certificate as a breach of the contract and ground for the rescission thereof, or else to abide by his contract. He was, however, bound to exercise his right of rescission, if at all, within a reasonable time. What is a reasonable time depends upon the circumstances of the particular case. Where the facts are in dispute, ordinarily the question is for the jury. Where the facts are not in dispute, the question is one of law for the Court. *Morgan v. McKee*, 77 Pa. 228, 231."

In *Hellmers v. Norris*, *supra*, it was held, as a matter of law, that sixty days was an unreasonable time for the rejection of a consignment of shoes.

In *Stone v. Frohlich*, 168 Mich. 128, 133 N. W. 951, it was held that ten weeks was, as a matter of law, an unreasonable time for the rejection of lumber.

In *J. L. Owens Co. v. Whitcomb*, 165 Wis. 92, 160 N. W. 161, plaintiff sued to recover the purchase price of a grain separator, rejected six weeks after delivery. On appeal, it was held as a matter of law that

the rejection occurred after the lapse of a reasonable time and the judgment of the lower Court in favor of the defendant was reversed and judgment entered for the plaintiff.

Similarly, in *J. B. Bradford Piano Co. v. Baal*, 166 Wis. 134, 164 N. W. 822, judgment entered in the trial court in favor of the defendant was reversed and judgment directed to be entered for plaintiff upon the holding that three months was not a reasonable time for the rejection of a piano.

The parties themselves by their actions in the case, have determined what is a reasonable time. The first inspection occurred on February 9, 1919, which was slightly over two months after the casting had been shipped from Reading. After welding and re-shipment, a second inspection was made one month after the casting had been reshipped from Reading, the date of reshipment being March 27, 1919, and the date of inspection April 26, 1919.

The actions of the parties indicate that between one and two months was a reasonable time for the inspection of these flywheels. Yet the first letter of rejection was not sent until September, more than four months after the inspection. Under these circumstances, can there be any doubt that an unreasonable time had elapsed? It is submitted that the learned trial Judge erred in holding that the small wheel was inspected and rejected within a reasonable time and that such error should be corrected by this Court.

If the above contention of the plaintiff is sustained, the plaintiff is likewise entitled to recover the purchase price of the small wheel, by virtue of the rule that—



2. FAILURE TO REJECT WITHIN A REASONABLE TIME  
MUST BE CONSIDERED AN ACCEPTANCE.

This phase of the case has been fully argued in connection with plaintiff's contention relative to the large flywheel.

The real reason for the rejection of these flywheels was not that they were unsatisfactory, but that the Government had secured cast iron wheels from the De La Vergne Machine Company at a price less than the price of the wheels delivered by the plaintiff and that these cast iron wheels, upon trial, had answered the purposes for which the steel wheels were originally ordered. All of the testimony, and the opinion of the trial Judge as well, indicate this.

The trial Judge said (Record, p. 185):

“There was another circumstance which although it did not consciously influence results doubtless did so. The Government experts wanted the flywheels to be of steel. The Machine Company could supply only cast iron. It was not thought that the latter would serve the purpose intended. There were in consequence two contracts made, one with the Machine Company for what it was to supply and with the plaintiff for the flywheels, and another contract was made with the Machine Company to machine the castings. The Government did not get the wheels as soon as they had need of them, and at first borrowed temporarily from the Machine Company two cast iron wheels. These were found upon trial to answer to the required purposes and were subsequently bought and kept installed permanently. The interests of the Machine Company and of the Government were thus brought into conflict with the interests of the plaintiff. The checks would not show up until the castings had been machined. When the necessity for welding developed, the wheels had to be sent back to the plaintiff and then returned to the Machine Company. Had

this necessity been anticipated by the latter company it would have charged more for the machining. The Government was able to get the iron castings for a less price than the sum the plaintiff was to receive.

"We thus get the atmosphere of the contract and the conditions affecting the acceptance of performance. Human nature being what it is, no matter how fair everyone tried to be, inspection and examination would inevitably be more critical than if the purchaser had been in as urgent need of the flywheels at the time of performance as when the contract was made."

#### C. CONCLUSION.

The contentions of the plaintiff, summarized briefly, are—

(1) That the defendant failed to inspect and reject the large flywheel within a reasonable time (which the trial Judge has held), that such failure to reject is, in law, an acceptance, and that consequently, plaintiff is entitled to recover the purchase price of the large wheel.

(2) That the holding of the trial Judge, that a rejection of the small flywheel more than four months after inspection was within a reasonable time, was error, which should be reversed by this Court, and that plaintiff is entitled to recover the purchase price of the small wheel by reason of the defendant's failure to reject it within a reasonable time.

It is, therefore, respectfully submitted that the judgment of the District Court should be reversed and that judgment in favor of the plaintiff for the price of both wheels be directed.

PAUL C. WAGNER,  
*Attorney for Plaintiff-in-Error.*

# In the Supreme Court of the United States

OCTOBER TERM, 1924

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READING STEEL CASTING COMPANY,  
plaintiff in error

v.

THE UNITED STATES OF AMERICA

No. 233

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*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA*

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## BRIEF FOR THE UNITED STATES

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### STATEMENT OF THE CASE

The appellant entered into a contract with the United States to manufacture for it two castings for flywheels, spoken of herein as a "small flywheel" and a "large flywheel." Appellant was to cast them in the rough and then to ship them to a machining company, which, under a separate contract with the government, was to machine them. The court below found as a fact that neither of the castings as produced by the appellant conformed with the requirements of the contract. They were defective by reason of "checks" or cracks. These defects might have

been remedied by welding after they were revealed by the machining. After the defects had been revealed by the machining the appellant was given the privilege of welding them and so causing the castings to conform to the contract, but did not do so. There was no delivery of the castings except that to the machining company. The United States rejected both castings.

A provision of the contract, paragraph 2 thereof, page 10 of the record, gave the United States the privilege of inspecting, examining, and approving the castings upon their delivery or completion and made this approval a condition precedent of acceptance. The court below found as a fact that as to one of the castings, the "large flywheel," it was not inspected under this provision of the contract within a reasonable time. As to the other casting, the "small flywheel," the court below found as a fact that it was inspected and rejected within a reasonable time.

The findings of fact made by the court below are set out on pages 192 and 193 of the record. The foregoing statement, in so far as it purports to set out facts, is confined to those presented in these findings. No others, we believe, are before the court in a case arising, as does this one, under the Tucker Act.

The issue is whether the United States shall pay the contract price for defective castings, not conforming to the contract, solely because it did not

exercise its privilege under the contract of inspecting, examining, and approving (or rejecting) them within a reasonable time. A lesser issue is, as to the smaller casting, whether this court will go behind the finding of fact that it was rejected by the United States within a reasonable time to determine whether from the evidence before the court below the rejection was within a reasonable time.

#### ARGUMENT

This is a Tucker Act case. It was for that reason that the Circuit Court of Appeals held that it had no jurisdiction and so transferred the case to this court. As such a case what this court will review is greatly limited. As the court, speaking through Mr. Justice Harlan, in *Chase v. United States* (155 U. S. 489, l. c. 500), said:

But under that act (reference being to the Tucker Act) a judgment of a District or Circuit Court of the United States in an action at law brought against the government, will be reexamined here only when the record contains a specific finding of facts with the conclusions of law thereon. *In such cases this court will only inquire whether the judgment below is supported by the facts thus found.* And, we think, it was also the purpose of Congress to require like specific findings or statements of fact and conclusions of law in cases in equity and in admiralty brought under that

act in the District and Circuit Courts of the United States, and to restrict our inquiry in such cases, as in actions at law, to the sufficiency of the facts so found or stated to support the final judgment. (Italics ours.)

The rule as to a case of this character is the same, therefore, as in a case against the United States originating in and appealed from the Court of Claims. There as here the inquiry of this court is restricted to the single question as to whether the facts as found below support the judgment. (*Mahan v. United States*, 14 Wallace, 109, *District of Columbia v. Barnes*, 197 U. S. 146.) The evidence below upon which the court's findings of fact were based is not for the consideration of this court unless incorporated in the findings as a part thereof. (*United States v. Clark*, 96 U. S. 37.) Nor will this court eke out or supplement the findings of fact from the opinion of the court below. Thus in *Crocker v. United States* (240 U. S. 74) the court, speaking through Mr. Justice Van Devanter, said:

In the briefs reference is made to portions of the opinion delivered in the Court of Claims as if they were not in accord with the findings. We do not so read the opinion, but deem it well to observe, as was done in *Stone v. United States* (164 U. S. 380, 382, 383), that "the findings of the Court of Claims in an action at law determine all matters of fact precisely as the verdict of

a jury," and that "we are not at liberty to refer to the opinion for the purpose of eking out, controlling, or modifying the scope of the findings."

Notwithstanding the law as thus declared, appellant in its brief derives its facts in large part from the evidence taken in the District Court and from the opinion of that court, refusing to confine itself, as we submit this court will do, to the findings of fact of the District Court as they are set out in the record on pages 192 and 193. Our argument will be based solely upon the findings of fact, and our query shall be (what this court in *Chase v. United States*, *supra*, said was the only query in a case like this), whether "the judgment below is supported by the facts thus found."

## I

As we view it, little argument is required to refute appellant's claim to be paid under the contract for the flywheel discussed in appellant's brief and here as "the small flywheel" and referred to in the findings of fact as the "smaller casting." Consider the case for the moment as dealing only with this "smaller casting." We have the allegation of the petition, page 4 of the record, that the appellant entered into a contract with the United States to make such a casting in accordance with specifications constituting a part of that contract. We have the answer of the United States, page 15 of the record, specifically

denying in paragraph 5 thereof that the appellant furnished a casting in accordance with the specifications and conditions of the contract. We have findings of fact Nos. 1 and 5, pages 192-193 of the record, that the castings, including this one, were not furnished in conformity with the contract. We have the further finding of fact, No. 6, page 193 of the record, that this "smaller casting" was inspected by the United States and rejected within a reasonable time, appellant having agreed, see paragraph 2 of the contract, page 11 of the record, that inspection and approval should be a condition precedent to acceptance. The question is, the only question, do these facts so found support the legal conclusion that the United States is not bound to pay the contract price for this "smaller casting"? Certainly they do. Inferentially appellant so concedes.

Appellant reaches a contrary result by striking out one of the findings of fact made by the court below. He strikes out the finding that the rejection was in a reasonable time *by an argument based upon the testimony in the case, which this court will not consider*, being bound by the finding of fact that the rejection was within a reasonable time. (Cases cited *supra*.) None of the cases cited by appellant in this connection is a case arising either under the Tucker Act or appealed from the Court of Claims.

Not only for this reason does appellant's attack upon so much of the judgment below fail, but, as we shall see, it fails also for the reasons hereafter to be stated and applying both to the smaller and



the larger casting, the "small flywheel" and the "large flywheel" as they are named in appellant's and our brief.

## II

In support of its contention that as to the "larger flywheel" it is entitled to be paid under the contract appellant urges a legal theory with which, abstractly stated, there can be little quarrel. Between two individuals, certainly, if one of them contracts to make a flywheel for the other, delivers it to him, nothing more remains to be done in order to complete it, if it is received by him, and thereafter not rejected within a reasonable time, such other person will be liable for the contract price. Under such circumstances he is deemed in legal effect to have accepted the flywheel. The cases cited by appellant hold no more than this. The rule relied on goes no further. *But that is not this case.*

What are the facts here, that is, as they are presented in the findings of fact, and, again, our inquiry is confined to them.

Is it a fact here that these castings were finally delivered by the appellant to the United States, as fully conforming to the contract, nothing further remaining to be done by the appellant, and that after such a final delivery there was a failure to reject them within a reasonable time? No. Yet that is a prerequisite to the legal theory relied on by the appellant.

There is no finding of fact that the castings were ever delivered to the United States. They were sent to a company which was to do the machining of them, but the duty of the appellant under the contract was not finished when the castings were shipped to the machining company. The contract obligation of the appellant (certainly so much will be conceded) was to furnish sound castings, not castings defective from "checks" or cracks and likely at any moment to fly to pieces on that account. The extent of the "checks" or cracks which were in these castings could not be known until after they were machined. When known, they could be welded. The welding was a part of the contract obligation of the appellant and was necessary to be done by it before its work was complete under its contract. Having done that welding and only then it was in a position to make final delivery of the flywheels to the United States. All of this is clearly supported by the findings of fact as they appear on pages 192-193 of the record.

So the large flywheel was delivered, not to the United States, but to the machining company. It was machined. The machining disclosed cracks indicating the wheel was so defective as not to conform to the contract. "*Plaintiff (appellant here) was given the privilege of welding the cracks when disclosed by the machining.*" (Finding of fact, No. 4.) "*This welding was, however, not done, nor the castings made as required by the contract.*"

(Finding of fact, No. 5.) No other delivery of any kind is mentioned in the findings excepting this delivery to the machining company, which delivery, as findings 4 and 5 clearly indicate, was not a final delivery to the United States, but merely a temporary dispossession from the appellant of the castings while another contractor did its special work upon them and thereafter the resumption of possession by appellant (at least he had the right to resume possession) until it could complete the work of making the castings in conformity with the contract.

We emphasize the fact that the court below found as a fact that when the machining disclosed that there were cracks in the castings, and that includes the larger casting, the appellant was given the privilege of welding them and so making them conform to the contract requirements and that appellant did not weld them, leaving them in a defective condition. Thereafter there was no delivery to the United States. *In other words there never was delivery of the completed castings. The time did not begin, therefore, within which it was the duty of the United States to reject within a reasonable time.*

Suppose the appellant was to do all the work to be done upon these flywheels, including the machining. It has made the castings in the rough. Next, it has machined them. Cracks are disclosed thereby. Under its contract it is appellant's duty to weld these cracks. It does not do that. Can it

recover from the government the contract price on the ground that the government has not inspected and rejected within a reasonable time? Certainly it can not, because it has never made final delivery under the contract to the government. Is that situation changed because an intermediate operation was performed, not by the appellant, but by an independent contractor? We submit, it is not changed.

We have sought to show by the foregoing that the facts essential to the applicability of appellant's asserted legal theory are absent from this case. There is left the simple situation of an attempt to recover on a contract which has not been performed. Such an attempt, of course, must fail.

### III

We have been favored with appellant's brief, disclosing its contentions, only two days before this case is to be called for oral argument. The situation forces us to a perhaps too great condensation of discussion. We respectfully submit, however, that neither of the two contentions which appellant makes is a tenable contention, for the reasons we have stated, and that, therefore, the judgment of the court below should be affirmed.

JAMES M. BECK,

*Solicitor General.*

MERRILL E. OTIS,

*Special Assistant to the Attorney General.*

### ADDENDA

The following additional points were made on the oral argument: I. An essential element of appellant's burden is to show it delivered to the United States *the thing it contracted to deliver*. The finding of fact is that it did not do that. *That the United States may be estopped from making a possible defense* does not relieve appellant of an essential element of its affirmative burden. II. Paragraph 2 of the contract, page 10 of the record, shows the contract included a certain "proposal" of appellant. That that was the agreement referred to by the president of appellant (page 103 of the record) that appellant would weld cracks disclosed by machining is indicated by what appellant did under the contract as shown by finding No. 6, page 193 of the record. That appellant construes the contract to require this welding appears from its assignment of error No. 13 (page 196 of the record). Since appellant refused to do the welding, it follows that it never delivered *as completed* either casting. III. Nonrejection within a reasonable time is the equivalent of acceptance *only when standing alone and not when accompanied by other facts inconsistent with acceptance*. Here are such other facts, reasonably to be inferred from the findings of fact, as, notice to the

appellant of the cracks when discovered, giving the appellant opportunity to repair them, appellant's refusal so to do. IV. The two castings constituted a single item (page 8 of the record). Acceptance cannot be presumed from the nonrejection of one-half of an indivisible subject matter of a contract, especially in view of the agreement of the parties (paragraph 8 of the contract, page 13 of the record) that no payments should be made under the contract until both castings were delivered and accepted. V. The United States may not be estopped from defending on the ground of noncompliance with the contract by reason of the mere negligent omission or laches of its officers. *Gaussen v. United States*, 97 U. S. 584, 590.

READING STEEL CASTING COMPANY *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA, TRANSFERRED FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 233. Argued January 26, 1925.—Decided April 27, 1925.

1. Upon review of a judgment of the District Court in an action on a claim against the United States, (Jud. Code § 24, par. 20,) facts admitted and concessions made by the parties may be considered with the lower court's findings of fact. P. 188.
2. A contract between a private party and the United States for sale of goods by the one to the other is to be construed, and the rights of the parties under it determined, by the same principles as if it were between individuals. *Id.*
3. Casting's, defective because of checks, were delivered to the Government under a contract allowing the vendor to remedy such defects after their extent should be revealed by machining, the burden of which was assumed by the Government. The machining was not done. *Held* that the Government's failure to inspect the castings and give notice of rejection, within a reasonable time, amounted to an acceptance. P. 187.

Reversed.

ERROR to a judgment of the District Court in favor of the United States in an action on contract. The case went to the Circuit Court of Appeals and was transferred. 293 Fed. 386.

*Mr. Paul C. Wagner* for plaintiff in error.

*Mr. Merrill E. Otis*, Special Assistant to the Attorney General, with whom the *Solicitor General* was on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was brought under § 24, par. 20 of the Judicial Code, to recover \$7581.95, alleged to be due upon

a contract between plaintiff and defendant. The court gave judgment in favor of defendant. Plaintiff took the case to the Circuit Court of Appeals on writ of error, but it should have been brought to this court. *J. Homer Fritch, Inc. v. United States*, 248 U. S. 458; *Campbell v. United States*, 266 U. S. 368. The case was transferred to this court under § 238a, Judicial Code; Act of September 14, 1922, c. 305, 42 Stat. 837. 293 Fed. 386.

The facts admitted include the following. September 4, 1918, plaintiff made a contract with the Post Quartermaster, United States Marine Corps, Quantico, Virginia, acting under the direction of the Secretary of the Navy for and in behalf of the United States. By it, plaintiff agreed to furnish two fly-wheels according to certain drawings, each to be cast in halves "in the rough." Delivery was to be made by September 28, 1918, at Reading, Pennsylvania, for shipment to the De La Vergne Machine Company, New York City. The contract contained a provision that upon delivery, and as a condition precedent to their acceptance, the castings should be inspected and approved by defendant, and that any article not so approved would be rejected and should be removed by plaintiff immediately after receipt of notification of such rejection. The court found facts as follows. "The plaintiff failed to perform its contract in that the castings were defective because of the presence of checks. These defects could have been remedied by welding, and the castings thus made to conform to contract. The extent of the cracks and the consequent required welding could not be determined until after the castings had been machined. Plaintiff sent the castings to the company which was to do the machining, and plaintiff was given the privilege of welding the cracks when disclosed by the machining. This welding was, however, not done, nor the castings made as required by the contract. The smaller casting which was the first casting supplied was inspected



and rejected within a reasonable time. After partial welding it was again inspected and rejected within a reasonable time. The large casting was not inspected until after a reasonable time. This wheel was shipped December 27, 1918, and reached its destination before February 7, 1919. It had not been inspected on December 6, 1919, and notice of inspection and rejection was not given until October 26, 1920, after suit brought."

In its brief, defendant contends that the plaintiff was bound by the contract to weld checks disclosed by machining; and the plaintiff so construes the contract. The facts admitted and the concessions made by the parties may be considered with the findings of fact made by the district court. This is not inconsistent with the rule stated in *Crocker v. United States*, 240 U. S. 74, 78, restricting our inquiry to a consideration of the case on the findings. See *Ackerlind v. United States*, 240 U. S. 531, 535. The contract is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals. *Smoot's Case*, 15 Wall. 36, 47; *Manufacturing Company v. United States*, 17 Wall. 592, 595; *United States v. Smith*, 94 U. S. 214, 217.

As the castings for the smaller wheel were not made to conform to the contract by the welding of the checks for which it was rejected within a reasonable time, plaintiff is not entitled to recover on account of it.

The defendant failed within a reasonable time to inspect the castings for the larger wheel or to give notice of rejection. Plaintiff was not in default. It made delivery as agreed by shipping the castings to the company which was to do the machining. Plaintiff was not bound to have the machining done, and, as between it and defendant, that burden was on the latter. The extent of the checks could not be determined before the castings were machined. Defendant was bound by the contract to ac-

cept or reject the castings within a reasonable time. It is well settled in the law of sales that receipt of goods will become an acceptance of them if the right of rejection is not exercised within a reasonable time. *Foss-Schneider Brewing Co. v. Bullock*, 59 Fed. 83, 89. Defendant must be held to have accepted the castings for the larger wheel. Plaintiff is entitled to judgment for the contract price.

*Judgment reversed.*